

INTERNATIONAL LABOR AND  
ENVIRONMENTAL STANDARDS

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Y 4. B 22/1:103-129

International Labor and Environment...

HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
INTERNATIONAL DEVELOPMENT, FINANCE, TRADE  
AND MONETARY POLICY  
OF THE  
COMMITTEE ON BANKING, FINANCE AND  
URBAN AFFAIRS  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRD CONGRESS  
SECOND SESSION

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MARCH 23, 1994

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Printed for the use of the Committee on Banking, Finance and Urban Affairs

Serial No. 103-129

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# INTERNATIONAL LABOR AND ENVIRONMENTAL STANDARDS

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WEDNESDAY, MARCH 23, 1994

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON INTERNATIONAL DEVELOPMENT,  
FINANCE, TRADE AND MONETARY POLICY,  
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 2 p.m., in room 2128, Rayburn House Office Building, the Honorable Barney Frank [chairman of the subcommittee] presiding.

Present: Chairman Frank, Representatives LaFalce, Kanjorski, Rush, Watt, Fingerhut, McCandless, Huffington, and Sanders.

Chairman FRANK. This hearing of the Subcommittee on International Development, Finance, Trade and Monetary Policy will now come to order.

We are beginning today what will be a series of hearings culminating, I hope and expect, in legislation which I expect to work with other members of the subcommittee to draft dealing with the question of the standards that should be applied in international economic relations.

This subcommittee has, of course, jurisdiction over much of the United States involvement in the international economy, through American participation in the World Bank, the International Monetary Fund, and the regional multilateral development banks, and also through the U.S. Export-Import Bank. There is, of course, jurisdiction elsewhere, in the Foreign Affairs Committee, over bilateral foreign aid. There is jurisdiction in the Ways and Means Committee over trade and the various aspects of trade, including the generalized system of preferences for lower-income nations.

We recently went through one of the most divisive political debates I have ever seen in this country on the question of NAFTA. And many of us were somewhat anguished in that debate because we felt torn between a support for an international approach to economics and a concern for poverty all over the world and a fear that American workers would be disproportionately negatively affected without there being corresponding advantages to workers elsewhere.

I and others have been talking for some time about trying to shape American international economic policy in conjunction with the other wealthier nations—the Western Europeans, the Japanese, the Canadians—those that are in a position of giving bilateral foreign aid or giving money to the multilateral development organi-

zations, or in the position of granting trade concessions of one sort or another.

What we are trying to explore is the feasibility of coming together to set standards in the areas of labor, environment, human rights, and elsewhere, that would be conditions for the granting of our aid. That has for many of us two distinct advantages.

First, it does a great deal to ensure that the assistance we give, in fact, enhances the living standards of the average worker in the countries that are the recipients; second, it reduces the extent to which American workers and others are at a competitive disadvantage because of a gross disparity in standards. To the extent that other nations ignore basic standards of decency in labor relations, ignore any concern whatsoever for their environment, they gain sadly, in the short run, a competitive advantage.

This subcommittee has direct jurisdiction over the multilateral development banks, but in conjunction with other subcommittees, it seems to me we could come forward with a set of proposals which would give very strong encouragement to the institutions that dispense this aid and the nations that receive it to adopt a set of rules with regard to working conditions, environmental conditions, and human rights in their own countries that, as I said, would both lessen the disparity that we suffer from and in fact improve the lot of the people over there.

Obviously, this is difficult. You are dealing with a lot of nations on the donor side and a lot of nations on the recipient side. Some work has been done in this field, and the International Labour Organization in particular has had some jurisdiction over this. This is one of the things we will begin to explore today.

As I said, this is the first in a series of hearings in which we are going to try, I hope, to demonstrate the feasibility of putting in place in our government and in cooperation with other governments a set of policies that would advance these goals.

Mr. McCandless, do you have an opening statement?

Mr. McCANDLESS. Thank you, Mr. Chairman. I do not have an opening statement, but I do have a couple of comments I would like to share with the chairman and other members of the subcommittee.

You know that although the U.N. International Labour Organization has developed more than 100 international conventions and protocols on labor standards through tripartite consultations with labor, management, and governments, the U.S. Senate has ratified only a few of these. I think we had better look in some of our closets before we move on too fast. A glaring example of this is that the United States has not yet ratified ILO convention number 87 on workers' right to organize and elect representatives, which was submitted to it in August 1949.

So, yes, there has been some work done in this area, Mr. Chairman, but I think that we had better look inward and see what our goals and objectives are here relative to the interests of the United States and as a participant.

Thank you.

Chairman FRANK. Thank you. Mr. LaFalce.

Mr. LAFALCE. Thank you very much, Mr. Chairman.

I am absolutely delighted that you are having this hearing because it addresses a topic that I have long been interested in and something that I think is vital today, perhaps the most important issue confronting the world today, and I do not say that lightly.

The very first public speech I ever gave was in my high school days and it was on the papal encyclical *Rerum Novarum*. And that papal encyclical dealt with the rights of working men and women across the globe. And 40 years later, there was a new papal encyclical, *Quadragesimo Anno*, what had gone on for years after insofar as the rights of working men and women. And a few years ago, another encyclical *Centesimus Annus*, what had gone on in the 100 years since *Rerum Novarum*.

As chairman of the Small Business Committee, we did something a lot of individuals wondered why we were doing at the time. We had a hearing on *Centesimus Annus*, the rights of working men and women across the globe and how important they were.

And this past year, we had a great debate on NAFTA and my principal opposition to NAFTA, as I articulated it, was that it dealt only with the rights of capital. It did not deal with the rights of labor. We cannot consider only capital or only labor. We must consider both, especially in international agreements and especially in the year 1994.

A few weeks ago I inserted in the *Congressional Record* an article that was an essay from *America* magazine that was written by Msgr. George Higgins. Msgr. George Higgins is known as the labor priest within the United States. We don't have too many of them anymore. It was entitled "The Catholic Church and The ILO, A Commonality of Social Purpose." It should have been entitled, perhaps, "The United States and the ILO, A Commonality of Social Purpose."

This is the 75th anniversary, 1994, of the creation of the ILO. I call upon Mr. Kirkland as president of AFL-CIO, I call upon President Clinton, as President of the United States, to do a number of things: to have a major conference on where we have gone since the ILO was created and where we must go.

I call upon the U.S. Senate, as Mr. McCandless did, to ratify the conventions of the International Labour Organization. With your indulgence, I am just going to read briefly from Monsignor Higgins's very excellent essay.

He said, "To guide its work as the 21st century approaches, the ILO has set three major priorities. They are first, to broaden the framework of protection available to workers; second, to assist democratic efforts that are spreading around the globe; and third, to galvanize forces to combat the poverty that afflicts 1 billion people worldwide. Many nations have shaped their labor laws on ILO conventions, recommendations, and codes of practices. In the ILO's 75th anniversary year, we might rightfully ask what can America do to further the goals of the ILO?"

He says, "One way for our nation to signal that it intends to assume a larger leadership role in the ILO would be to move the determination to ratify the organization's human rights conventions. These basic conventions, not yet ratified by the United States, deal with freedom of association, the right to organize and bargain collectively, discrimination, and child labor. By ratifying these core

conventions, the United States would send a positive message to the rest of the world."

We have a charter. We have a path to follow and it is pretty clear, and it ought start with a conference on the 75th anniversary. It ought to start with a push for ratification of the ILO conventions and then it should conclude with legislation to establish the ILO conventions as preconditions, eligibility criteria.

With your indulgence, let me have 1 more minute. Just one more indulgence.

We are going to switch to the Institute for International Economics. They are going to publish a book shortly, and I have got an advanced copy of a portion of the book. It is going to be *Western Hemisphere Economic Integration*, and one of the chapters is going to be "Eligibility Criteria." They are going to talk about a lot of eligibility criteria, mostly economic criteria, price stability, external debt, market-oriented policies, reliance on trade tracks, and so forth, all of that is well and good, but there is something else, too, they talk about: functioning democracy.

And they say something that is very disturbing to me: that trade liberalization often increases the income gap between rich and poor. They go on to explain that, and I won't read any further because I am afraid Mr. Frank's indulgence is going to wear thin.

But we have got to insist that trade liberalization not mean a greater gap between the rich and the poor and that is what is happening because of another phenomenon that is taking place of great import, the privatization phenomenon that exists throughout the world, which we favor. There are many different forms of privatization.

The privatization of Mexico, patron privatization, and the privatization of Russia, nomenclatura privatization, which concentrates the wealth of society ever more greatly. It does not in any way bring about a greater distribution of existing and future societal wealth. We need to fashion a U.S. policy that calls for empowerment privatization, a privatization that enables the workers of the state-owned industries, the people in these countries to have an industry that fosters a small business sector so you can have a functioning market economy.

And U.S. policy right now is virtually silent on these issues. And in the absence of a policy we are bringing about greater and greater concentration of wealth in those countries, the exact opposite of what our policies should be.

I thank the chairman.

Chairman FRANK. I thank you, and we will be returning to this theme. I appreciate the gentleman's interest. I was delighted when we talked earlier to realize we shared this passion.

With the indulgence of my colleagues, we have the majority leader. I am going to call on him and return to the Members for opening statements.

Are you in a great hurry?

Mr. KANJORSKI. I have to leave.

Chairman FRANK. Mr. Kanjorski.

Mr. KANJORSKI. Thank you, Mr. Chairman. I want to congratulate you for these hearings, and the majority leader, and the leader of our labor movement in America. It seems to me that if America

stands for anything, it should stand against exploitation of labor, whether it be here in the United States or around the world.

And it gives us a great opportunity as the only remaining super-power to set the course of conduct in the world, and particularly not to coerce but to use our financial influence where we offer it to other nations of the world to meet minimum standards whether they be wage, working conditions, or environmental standards.

I had the opportunity in the 102nd Congress to offer an amendment to the international trade bill, which would have put teeth in the negotiating between the United States and our world lending institutions and making minimum standards, fair standards of wages and the working conditions, and over a period to the year 2000 they would have met that standard comparable or equal to the United States.

When I visit my district, the one question asked is what is going to happen in NAFTA and GATT and all the other areas as we open up the exploitation of labor on the world whether it be free labor, cheap labor, forced labor, or competitive labor? Most people look at the long vision they say, well, we will eventually make Buicks that will be bought in Mexico. My biggest question is how do you buy a Buick at 50 cents an hour and it seems incumbent upon American labor and American industry to establish standards and methodologies over a long period of time so that the industrialized nations of the world and the developing nations of the world understand that the exploitation of labor in any form is unacceptable in America.

Thank you, Mr. Chairman.

Chairman FRANK. I thank the gentleman. We will now hear from the majority leader. We appreciate very much his joining us. I realize he has a couple of other things to deal with today, such as the crime bill. So we are pleased to have the majority leader, who has been one the leaders intellectually and politically in trying to deal with the question of how you forge a trade policy that both promotes economic growth and meets the human values that are very important to so many of us.

Mr. Gephardt, please.

#### **STATEMENT OF HON. RICHARD A. GEPhARDT, MAJORITY LEADER, HOUSE OF REPRESENTATIVES**

Mr. GEPhARDT. I thank you, Mr. Chairman and thank the members of the subcommittee for taking on this very, very important question and pioneering and holding hearings on it. I think it is a central question of our age and in our country and in the world, and I think these hearings will help all of the Members of Congress and the public and perhaps people all over the world better understand these issues.

You understand that when we talk about the dollars that flow across our borders, we have got to talk about ways to use those trade and development dollars to promote international labor and environmental standards. I would add to this list the crucial goal of promoting human rights and democracy throughout the world.

Mr. Chairman, these days there is a heated policy debate about the kind of leadership that America should demonstrate in this new world economy. Despite the growing tensions in Korea, Bosnia,

and so many other nations, the post-cold war world is, at its heart, not so much about military competition but about economic competition. Increasingly, the strength of a nation is measured not in missiles, but in markets.

But at the same time, the goal is not simply to enter these markets. The goal is not simply to chase the lowest wages around the world, to find new excuses to move jobs and opportunities overseas. As we play a greater role in the emerging economies of the world, we've got to bring to the table not just dollars but values. We have got to export not just our corporations but also our compassion.

We have got to push developing nations to make basic human rights, and workers' rights, part of the trade bargain.

This is a moral issue. Because if we don't honor the world's workers—if we don't care about them and invest in them and empower them—then we are abandoning our highest mission as a government and as a people.

But it is also—and this is important to note—an economic issue. If workers don't share in the fruits of their labor, as Mr. Kanjorski just eloquently said, how can they buy our products? How can they buy their products? How can they sustain new growth and opportunity? How can we create a new middle class throughout the world? And how can we save our workers from a dangerous downward spiral, one that will only wound our global economy?

If we keep insisting on false distinctions between the needs of our wallets and the needs of our people, we are only going to compromise both.

The same is true of the environment. Words truly cannot describe the levels of pollution in many of our developing countries. It is wrecking the planet and it makes it hard for American companies, companies that must follow our strict and sensible laws, to compete.

Many of these nations do have decent laws on the books, labor laws and antipollution laws, but they are not being enforced. So I am going to soon introduce a new bill called Blue and Green 301. I am often asked what the "blue and green" is. Blue is the shirt color, labor; and green is green, the environment. This bill would say if you don't even enforce your own laws, if you abuse your workers, misuse the environment, and make it hard for nations with a conscience to compete, that is an unfair trade practice, and we are going to call you on the carpet for it.

There is much more we ought to be able to do to make sure that trade lifts up the people of the world rather than holding them down.

We should form working groups within the GATT on the environment and on workers' rights, groups with a real plan and a real mandate, because every responsible nation must play a role. And I believe this should be agreed to before we actually sign the GATT this April 15.

Parenthetically here, I want to say Micky Kantor yesterday announced that we were going to enter such a working group in the GATT on the environment. I applaud him for that. What I didn't hear, what I hope I will hear, and I think most of you will think what we should hear, is that the administration is trying to enter

into a working group on labor rights as well as the environment as part of this next GATT negotiation.

We should inject new life into the International Labour Organization, which the gentleman from New York talked about, which will soon celebrate its 75th year of progress.

We have got to recognize that the linkage between our economic interests and human rights, labor rights and the environment simply cannot be broken. In the long term, these interests represent separate tiles in the mosaic of our domestic and international economic policies.

And I want to state again that we have got to stop isolating these questions, these issues. They are one thing. They cannot be taken apart. They only are taken apart in our minds. In reality, they are part of the same thing. They are a part of the same piece of cloth. Any other analogy you want to use. They are inextricably intertwined, and to think that we can talk about economic policies and trade policies and forget the environment or forget human rights or forget labor rights is to almost be insane. The definition of insanity is misperceiving reality. In my view, reality is that these things are all of one piece.

Of course, some believe that all tiles are not created equal, and that development must be our first priority, with democracy, surely, to follow when the moment is right. They say that development breeds democracy, and that we should think twice or even five times before giving any other interest the same kind of weight.

But while we can never ignore the fact that development breeds democracy, neither can we abandon our nation's commitment to development through democracy. And if the United States doesn't use its moral and economic leverage to lead the world to push for a new fusion of all of our interests, who will? Who will?

If you are a dissident in China today you have got to ask yourself who is going to stand up for me? Why would you have the courage in China today to speak out, if there isn't somebody in the rest of the world who will stand with you? I would suggest to you that there is only one country today that is standing up for the dissidents and their rights and their future in China. It is the United States.

We are having a raging debate about our China policy today, as we should. I think it is a good debate. If I wrote an article for the op-ed page of the Chinese newspaper, I couldn't get it printed, but if I were a Chinese dissident and wrote an article criticizing the policy of the government of China for the *New York Times*, I would be arrested. American businesses today are strongly criticizing the Secretary of the State and the President for our China policy. None of them are going to be arrested. Obviously, they shouldn't be. We encourage that debate and encourage that dissent. Who will stand for that dissent if it is not us?

Look at what happened in Chiapas, Mexico. Too many policy-makers were afraid to confront the basic injustices in Mexico's political system—the rights abuses, the lack of real representation.

On January 1 of this year, the people rose up and demanded economic opportunity, and it took a painful armed conflict to get the government finally to even listen to what they were saying.

At the same time, if the working people don't get a piece of the pie, if the workers at the Mexican TV factory live in shacks made of the packing material of the goods they produce, how can we create the consumer class that fuels economic growth from Bangkok to Beijing to here?

That is why we have got to press the cause for human rights and workers' rights and basic justice in China, in Mexico, and all over the world. It makes good moral sense and good economic sense.

It wasn't too long ago we were talking about South Africa. You remember that debate in our country. You remember people saying we shouldn't use our economic leverage to stand up for human rights in South Africa? That we could get South Africa to change if we just traded with them. And others in America said, no, that is the wrong thing, we ought to stand up, have a boycott. We are not going to trade with a country where people don't have basic human rights.

Last time I checked, they are going to have an election in April in South Africa. Do you think there would be an election in South Africa next month that includes people of all skin color if we had not stood for that basic democratic—small "d" democratic—human rights? I doubt it.

Would we ever have gotten on a level playing field to trade with South Africa with their workers being able to be properly compensated for their productivity if we hadn't stood for human rights and workers' rights? I doubt it.

There is democracy today in Poland. Do you think we would have democracy today in Poland if the man sitting behind me and others here had not insisted on human rights in Poland? If we had just traded our way to human rights?

We also have to focus attention on our participation in the multi-lateral development banks. We need to use these banks as catalysts for change, not simply protectors of the status quo.

Throughout the 1980s, trade and structural adjustment policies focused on transforming many lesser developed economies into market economies, with particular attention to the privatization of the public sector, reform of capital and money markets, and stabilization of macroeconomics. Unfortunately, these economic policies ignored the crucial missing link—labor market and social policies.

What is more, in the case of Latin America, social conditions in the region deteriorated, real wages fell in almost every country, and the middle class moved into poverty. As you might expect, the extreme poor shouldered the greatest burden of all the adjustments, and the poverty rates in the region have gone through the roof.

The banks have responded to these crises with a number of programs. The Social Emergency Fund, first developed in Bolivia by the World Bank, and now in place in many countries, provides basic social services to the poor. Youth training programs in Chile and across the region, funded by the Inter-American Development Bank and the Multilateral Investment Fund, support basic skills training and labor market assistance to both lower income youth and displaced workers. But I think we can do much more to pro-

mote labor market reforms and to encourage real policy progress in these countries.

I think our goals are clear: reforming and strengthening collective-bargaining arrangements; reorienting training and wage policies to promote and reward productivity and hard work; greater worker participation in the workplace.

All of these are essential to developing a globally competitive work force in that region and all across the globe. That is why these kinds of labor market policies should be top priority in trade discussions. And I believe the multilateral development banks can play an important role in promoting these reforms.

What we are really talking about is trade policy with a human face, a trade policy that raises the standard of living in these countries and, ultimately, in our country as well.

I believe we should use the multilateral development banks to say we know there are short-term costs to workers' rights and economic justice, and if you do your share, we will give you special loan rates to help you along. At the same time, we need to take a good look at those who are receiving our bank dollars to make sure they are truly aggressive in pursuing these policies.

We need to urge the African Development Bank to be a real catalyst for change in South Africa. We are now on the eve of elections, as I said, in that country. We should be proud that we promoted democracy, that we brought the evil of apartheid to change.

We need to move in quickly to see that our hard-fought victory really lasts. The African Development Bank needs to help promote growth and opportunity in South Africa beginning the day after the election.

We must find a way to address the enormous debts that we have to these institutions—I am told it is now about \$850 million—so we can pursue these goals with the assistance of other nations.

Some of us have been reluctant to support increased assistance to the multilateral development banks. I think we can understand why it is hard to get votes for those banks. We have quite simply failed to spell out our goals and our interests in the banks, and our Members have a right to demand that our dollars promote real growth and equity and opportunity so that we can turn to our constituents and say: "I honestly believe that this is in your best interests."

It is time to recognize that traditional approaches won't work in today's rapidly changing world. Our interests are not static, they are dynamic. It is time for us to create a vision of the future, and develop the policies to get there.

In a world of economic instability and interdependence, there are no easy answers. There are no catch-all paradigms or new world orders to all of our decisions, to tell us how much progress justifies a trade preference. Or what kind of rules and laws bridge the gap between a last-minute concession and a long-term commitment.

But what is clear is that America, the greatest, freest, most admired democracy in the world, didn't get where we are today by building a wall between our economic wants and our people's needs. We didn't get where we are today by holding out a carrot to injustice and throwing away the stick.

It is time to fuse our international trade with our indivisible principles because when you really think about it, there is no way to separate them. We have got to call it capitalism with compassion. You might call it development through democracy, or you might call it just good old-fashioned common sense, but in a world of shifting alliances and growing uncertainty, it is the most profound obligation that I think we have. And in an economy in which our people are the only advantage that we can really hold on to, it is the best investment and the surest commitment that we can ever hope to make.

I thank the gentleman and the subcommittee for hearing me out today.

Chairman FRANK. I thank the gentleman. I know you have a lot of business you must attend to. I am pleased to hear about that legislation, and I think ultimately the goal should be that the principles of that legislation govern the position of our foreign assistance bilaterally and also serve as a set of instructions to the American executive directors of the various international financial institutions, such as the World Bank, so that they would also not be voting for assistance to countries that fail to meet such standards. The same set of standards, it seems to me, ought to be commonly worked out to govern all American participation in these areas.

Mr. GEPHARDT. I agree with the gentleman and I, again, want to say that I think we make—it is a human mistake, because we think in words and words are limiting, words are not sufficiently descriptive of reality. But the words we think in put things in finite categories, and we think of the environment and that it is separate from these other issues or labor is separate from economic interests. Labor lies at the heart of economic success, and we should be asking other countries in every way that we can to embrace these values.

Chairman FRANK. Do you have time for some questions?

Mr. GEPHARDT. I would be happy to try to respond.

Chairman FRANK. Mr. LaFalce.

Mr. LAFALCE. No questions.

Chairman FRANK. Mr. Huffington.

Mr. HUFFINGTON. No questions.

Chairman FRANK. Mr. Kanjorski.

Mr. KANJORSKI. No questions. I thought it was a great statement, Mr. Chairman.

Chairman FRANK. Mr. Sanders.

Mr. SANDERS. Hello, Mr. Gephardt.

Mr. Gephardt, I agreed with much of your remarks, but let me ask you this: As you know, the labor and environmental supplemental agreements that were negotiated with NAFTA, in fact, provided very minimal protections. I know that you have requested that the President fulfill his commitment to create a GATT trade and environmental committee and expand upon this with a committee on international labor standards.

Unfortunately, some developing countries oppose these efforts as being protectionist and discriminatory. How can we address their concerns and foster the growth of developing economies while si-

multaneously promoting international labor and environmental standards?

Let me just add something to that. Despite NAFTA and despite all the agreements, you may know that recently in Mexico workers attempting to organize with the Teamsters, the United Electrical Workers, were fired from their jobs. Can you give us your thoughts on that?

Mr. GEPHARDT. Well, I agree with you that what we were able to finally get in NAFTA was better than not getting anything, but it wasn't good enough and I don't want to replay that debate. We have been through it, and we decided it.

One of the great things about our country is that we do have a way of making a decision and moving on, but I want and I think you want and other Members of Congress will want to revisit those questions, not to replay the debate, but to figure out if we can make what we thought was inadequate work. What I hope can happen is that as people are refused the right to organize and associate and collectively bargain, that we can use the labor mechanism that is there to enforce the agreement to try to get the right resolution of that difference.

I have my doubts that we are going to have a lot of success or certainly that anything is going to happen very quickly. One of my concerns with the mechanisms in the treaty was that it appeared to me you would have to have lawyers work for 8 years to even get anything presented to anybody. But we should do that. We should try to use what is there.

If we don't think it is working, we ought to make suggestions for how it might be improved, and I would like to work with anybody who wants to do that.

Beyond that, on GATT, I think we should be right now dialoguing with our own Administration, urging them to create a labor issue or a labor discussion in the GATT as we now apparently have on the environment. The environment is necessary. I am glad they did that. I applaud them for it, but I am very disappointed that we are not dealing with the labor side of this and I think we have to do that. That is the next step in the GATT. And we should be urging our side to push those developing countries to begin discussing those labor issues. It is not a good enough answer that they are not advanced enough or developed enough to do that. It is just not a good enough answer.

Mr. SANDERS. Mr. Majority Leader, let me just ask you this: We have seen during the NAFTA debate the enormous power of multinational corporations to dictate national policy. If you were the head of a multinational corporation, it is obviously to your economic advantage to want to go to a third world country where you can pay people 50 cents an hour, ignore the environment and democracy, and in fact, it is a very positive thing for you to do.

In fact, some of us are fearing that so-called global economy for precisely those reasons. Given the power that we have seen of multinational corporations to dictate national policy, how do you suggest that in fact we develop policy here which protects workers around the world and in fact ends up protecting American workers so that our jobs do not go to Mexico or to China or other undemocratic countries?

Mr. GEPHARDT. I guess I think it is our job to do it, and while I agree with some of your sentiment that multinationals probably aren't very interested in this, I didn't notice in the end of the NAFTA negotiation that our negotiators were being told by American multinational companies to slough over these issues.

We ran into a stone wall in Mexico. The Mexican government, in the final analysis, in my view—and I may be wrong, but this is my view—would not address these issues. And simply said at the end of the day, if we insisted on addressing these issues in the way a lot of us thought they should be addressed, that there would be no treaty.

In my view, what we should have said at that point is, "Fine, there is no treaty," and I blame that on us.

Now, others will disagree with me, and that certainly is their right, but this is my opinion so I am not as worried, I guess.

I understand your point. But our government has to take a stand and say, "No, we are not going to do the treaty."

Let's talk about China for a moment. We are going to face a decision on China, and I am ready to vote to give MFN to China if they substantially comply with the executive order the President has announced, but if they don't—and this is a raging debate now in our country. You have a lot of people who say "You just can't take away MFN, it will wreck the world trading system, it will ruin our economy, we will be eased out of China forever, the Japanese and the Europeans will get all the trade," generally predicting the end of the world, the same kind of argument you got about NAFTA. We have to stand for something ultimately, and I would have wished in NAFTA we would have stood for something.

Mr. SANDERS. Thank you.

Chairman FRANK. Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman.

Mr. Chairman, I don't have a question of the majority leader, but I just want to take a moment to thank him for his leadership in this particular area. His leadership is both inspirational and very, very insightful.

I just wanted to say, Mr. Majority Leader, I certainly appreciate the positions you have taken, and I appreciate the type of compassion and the type of leadership that you have shown to those of us who are seeking solutions to the same problems that you are addressing today.

Thank you.

Mr. GEPHARDT. I thank the gentleman very much.

Chairman FRANK. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I came in late and have just read through Congressman Gephardt's statement. I want to second the sentiments that have just been expressed by Mr. Rush and tell you that your leadership in this area certainly played an important part in my attitudes and helped to expand my vision about these international issues, which I have almost always dealt with locally or at the State level or at the broadest level on a national basis, certainly not internationally, and I do think that we are going to have to take some of what we stand for to an international level if we are going to continue to talk about a global economy.

Maybe I am soft pedaling to say some of what we stand for, we really need to take the values that we have beyond our shores if we are going to take the trade and commerce beyond our shores.

Thank you, Mr. Chairman.

Chairman FRANK. Mr. Fingerhut.

Mr. FINGERHUT. Thank you, Mr. Chairman.

They have already said all the nice things about you, so I will go right to a question other than to associate myself with the remarks of both Mr. Rush and Mr. Watt.

You truly are the leader on this issue and I have learned a lot from listening to you. You started to answer the question I was going to ask in response to Mr. Sanders and that was about MFN with China. Clearly, it is going to be the next big trade debate that this body is going to have and you have given us the outlines of your thinking.

The problem I think as we move into it is that the terms of the President's executive order are not well known so that we don't really have guideposts that are clear in the public's mind or frankly in our minds to know whether or not the terms have been met or not, and just like when the President made the decision to walk away from the table with the Japanese Prime Minister—a decision which I applauded—we are going to be into this question of do we have a deal that is meaningless or do we walk away because we don't want to endorse a deal that is meaningless?

Can you enlighten us a little bit on what we ought to be watching for? What are the guideposts as this debate unfolds and as the news unfolds so that we can keep it in some context before we have to vote?

Mr. GEPHARDT. I think it is important to really look carefully at what is in that executive order and then try to, over time, set that up against what is actually happening in China, and I hope we can have some forums where the Secretary of State and others can come down here and keep us constantly informed of what they are or are not doing day after day, week after week, month after month.

There are two conditions in the executive order that are absolute. The first—and as you know, this comes out of Jackson-Vanik so we are always talking about allowing citizens to leave the country. Jackson-Vanik, as you know, came out of the Russian situation. So the one absolute, the first absolute, is that they have to be allowing emigration, reasonable emigration from the country. That, frankly, has never been a great problem in China, although some of the dissidents and students have not been able to get out, even the ones that are not in jail.

So there is an issue there. It is not a huge issue, however. As one of the Chinese told me when I was there in January, if we would like to have a couple of hundred million people, he would be happy to give them to us any day we want them.

The second issue has to do with prison labor and allowing our observers to go into prisons where we suspect they are using prison labor to make products that are exported to the United States. They have begun to allow us to do that, but there is a ways to go on that one until we feel satisfied that they are not using prison labor to contribute to their present \$23 billion annual surplus with

the United States. Those two are absolute. There can be no subjective, substantial progress issue with those two.

The other ones are under a rubric of substantial overall progress and there are a number of areas that we are asking for that.

First, an accounting of prisoners, political prisoners, people that were involved in Tiananmen Square, where they are, how many of them are there, what is happening to them, including Tibetan prisoners as well.

Second, to get the International Red Cross into prisons to see if there are humane conditions in their prisons.

Third, a willingness to dialogue with the Tibetans. As you know, there has been an ongoing, longlasting difficulty with Tibet. We are not asking that they recognize Tibet. We are not asking that they give Tibet freedom. We are simply asking that a negotiation start between the Dalai Lhama, other Tibetan officials and the Chinese.

Finally, that there be general progress in human rights in China, that there be a movement toward general human rights. That one is not as clear.

So again I don't think we are asking a lot. I think this is a pretty reasonable request. The President has put it in writing. There is a way to judge it.

I think we ought to do it week by week. I mean we ought to be as informed as we can be. When I was in China in January, I told their leadership we come not to judge. We come not to pontificate. We have human rights problems in the United States. We are not here to say we are better than you are, but you must understand that these values are expressed in our Declaration of Independence and in our Constitution and the American people feel strongly about it and we cannot justify just a normal trading relationship with a country that is not recognizing these basic human rights. It is that simple.

Now, we will work with you. We will talk with you. We will dialogue with you. We will do anything you want to do. We will engage you early and often to try to talk you through what it is we think needs to happen here. But at the end of the day, if it hasn't happened, and it can't happen in 1 week, there has got to be incremental, steady, consistent, clear and reasonable progress.

I think they listened to us finally, and I think they listened to Secretary Christopher the other day.

Incidentally, as a side note, I think he has done well. I mean, I think he should have gone there. I think it is crazy to say he shouldn't have. I think he is getting hit by a lot of Americans who disagree with the policy, that it is their legitimate right to do that, but I think he did the right thing; I think they listened to him, and I think they are making some progress.

Mr. FINGERHUT. I thank you for that very detailed answer. It, certainly, shows your knowledge of this issue and that is exactly what we need to be saying publicly so that in the last week, in the flurry of paper and negotiations, we have some measurable outcomes.

I also am glad that you said what you have now twice in this testimony about Secretary Christopher. I think it is crazy to say that he looked weak going to China saying what American policy is, but what would look weak is if, having made the statements in China,

we then grant MFN, unless there really are measurable concessions that are made, and that is what concerns me as we come up against this deadline.

I thank you for that statement.

Mr. GEPHARDT. I thank the gentleman and I look forward to working with the Members here trying to evaluate the progress. I think we have to really get involved in it.

Chairman FRANK. I thank the majority leader.

We will now hear from Mr. Kirkland. Our next witness, Lane Kirkland is the president of the AFL-CIO and, obviously, a leading world spokesman for the set of issues we have before us.

Mr. Kirkland, we very much appreciate your joining us today.

#### **STATEMENT OF LANE KIRKLAND, PRESIDENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS**

Mr. KIRKLAND. Thank you very much, Mr. Chairman.

I have submitted my formal remarks to the subcommittee and I would just like to summarize them.

Chairman FRANK. Without objection, the written remarks will be made part of the record, as well as the written statement of Mr. Sanders and any other member who has a written statement, without objection, will be entered into the record.

Please proceed.

Mr. KIRKLAND. Mr. Chairman, members of the subcommittee, thank you for the opportunity to present the position of the AFL-CIO on this critically important issue.

In our view, the question of whether labor or human rights standards should be part and parcel of our bilateral and multi-lateral trade agreements has long been settled. Look at the history, if you will, where such standards have been pressed and tested and pressed again without flinching or retrenchment. They have been instrumental in helping ordinary working people cast off the yoke of totalitarian repression.

Look at the former Soviet Union. You see democracies emerging there today at least in part because the Western democracies refused to incorporate a repressive system into the channels of world commerce.

Look at South Africa. Does anyone doubt that next month's nonracial elections would have been taking place had it not been for the application of international trade sanctions?

Look at Chile today. It is a democratic country because its working people courageously demanded their freedom and the United States sided with them in revoking their oppressors' special trade privileges.

With regard to international financial institutions, look at the overwhelming success of the Marshall Plan which included a strong emphasis on the forging of democratic governments and the democratic institutions that make up civil society. These events are giving body to the proposition that freedom comes not from up high, not from the ministries and the counting houses of the elite, but from the ground, from the workplaces and the streets where ordinary people stand up and declare that they mean to live on their feet and not on their knees.

We simply ask that U.S. policy toward international trade and financial matters serve these aspirations and not those of the complacent elites and the gray establishments of Western society. We think there is compelling reason, both moral and practical, for pursuing that course.

In light of the evidence, Mr. Chairman, I think it is safe to say that it is not for this subcommittee or the Congress or the Administration or anyone, for that matter, to make a determination of whether trade should be linked with basic human and worker rights. That linkage is already there.

Capital flows freely across borders and enables flagless, stateless corporations to shop the world for the cheapest, most oppressed labor. To say that the question of human and worker rights somehow stands totally apart from all this is to deny reality.

Of course, there continue to be those who would have us believe that freedom and democracy are borne on the wings and in the pockets of capital and that cumbersome language about the basic rights of human beings only gets in the way. They have always been around.

Industrialists the world over thought that Franco was wonderful. So was Pinochet. Hitler and Saddam Hussein were, among other things, men you could do business with.

I recall the words of an American banker who reacted to the 1981 declaration of martial law in Poland and the arrest of Solidarity leaders with these words: Who knows which political system works best? The only test we care about is, can they pay their bills?

We have no quarrel with capital and markets as such; trade unions emerged from them, learned to live with them to become the instruments through which they are humanized, but we do not harbor any illusions either. Just as we do not expect governments to reform themselves, we do not expect the pursuit of profit to embrace a loftier mission. That is why we look to the Organization of Independent Democratic Institutions to advance the interests and aspirations of ordinary people against hostile state power and entrenched privilege.

The problem is that this goal is not served by the agents of private enterprise when they are left to their own devices, and its advancement should not be entrusted solely to them.

That is the reality of market economics. It has created a situation where Malaysia, a country that has lured dozens of multi-national corporations with promises of cheap docile labor and the banishment of free trade unions and so-called export processing zones, stands to lose its industries to China, the government of which is steadfast in its determination that it will not be outdone in the repression of human beings.

In the example, I give you last year's toy factory fire in Thailand that killed nearly 200 workers. Most of them were young women working long hours at low wages. Making toys for the children living in countries where the conditions that lead to such tragedies would never be tolerated. That was no accident. On the contrary, the dismal wages and conditions in that factory and particularly the government's toleration of them were precisely the reason that that factory was located there in the first place.

While the American toy importers were washing their hands of all responsibility, that event did not diminish the vigorous opposition to our attempts to have such exploitation declared an unfair trade practice and to deny special trade benefits to governments that tolerate such atrocities.

Our experience is that there is no despot on earth the good gentlemen of commerce will shun if there is money to be made. There is no limit to the depth so-called market pressures will drive wages and working conditions in the absence of enforceable standards on freedom of association, the right to organize and bargain collectively, the elimination of forced labor, a minimum age for child labor and acceptable conditions with respect to minimum wage, hours of work, and occupational safety and health.

That is why such standards are needed and why they should be incorporated in trading agreements among nations. It is not only the moral and just thing to do, but it is also an economic imperative.

Around the globe, the labor of millions of men, women, and children is still obtained by means of force, intimidation, or sheer desperation. Many live or die solely at their employer's discretion. These workers are neither players nor beneficiaries in the international free market system. They are its pawns.

The economic consequences are a matter of plain common sense: If workers don't earn enough to purchase the goods they make, you will end up with too many workers with too little money chasing too many goods and services.

Today, developed and developing nations alike are trying to cope with the results of chronic unemployment and underemployment, social and political destabilization, growing income inequality, and declining living standards.

On the other hand, the democratic experience has shown that workers who are free to pursue their fundamental rights through their own democratic institutions have been successful in building the strong consumer markets that support industrial growth and development.

The choice is clear. We believe there are a number of steps the U.S. government should take in order to pursue the right course.

For one, the United States should increase its unilateral efforts to enforce workers' rights standards. By that, I mean that those standards that are already incorporated in U.S. laws governing the Generalized System of Preferences, the Overseas Private Investment Corporation, and the Caribbean Basin Initiative should be enforced.

These standards should also be incorporated in all future bilateral and multilateral trade agreements. They should be genuine and enforceable and not fashioned after the weak and ineffective side agreements to NAFTA.

I would note that the AFL-CIO recently sent a delegation to meet with the trade union movements of Chile, Argentina, Paraguay, Uruguay, and Brazil regarding potential free trade agreements with the United States.

Let me tell you that they want no part of NAFTA and its paltry language on worker rights. They want separate agreements that contain in their body strong, enforceable labor standards. They

have pledged to stand with us to secure those standards in any future trade agreements with our country.

Meanwhile, at the international level, the United States should redouble its efforts to push the GATT countries to adopt a social clause that requires member nations to respect basic internationally recognized human and worker rights.

We also believe that it is time for this Congress to instruct the executive branch to use its voice and its vote on the boards of the international financial institutions to ensure that these institutions serve and do not undermine the purposes for which democratic governments are brought forth, and that is to serve the aspirations of ordinary people for freedom, a better way of life, and a fair share of the fruits of their labor.

Specifically, we should push to ensure that government accountability and worker rights criteria are factored into the decisions on the division of loans and grants and their subsequent assessment.

Our government should also be taking these criteria into account in its own decisions on how to allocate its limited foreign aid budget.

Mr. Chairman, I could go on. I could give you chapter and verse about the ill-considered shock therapy policies of the international financial institutions and their detrimental effects on nations of people who have suffered for decades.

I could talk about why the brutal dictatorship in China doesn't deserve to be treated as any democratic nation under our tariff system, but I think it is best if I stop here and answer your questions.

Thank you for the opportunity to appear before you.

[The prepared statement of Mr. Kirkland can be found in the appendix.]

Chairman FRANK. Thank you, Mr. Kirkland.

This is, in our mind, the beginning of an effort that we believe will end with legislation.

Mr. LaFalce, who chairs the Small Business Committee, is very interested in this, and the majority leader, obviously. I very much agree with your analysis.

Let me ask you two questions about some of the negative arguments we get because I think you can help us deal with them.

One argument we get is that it is just too hard to do standards, that while the notion of international standards is a nice one, the reality of actually formulating such standards, given a multicultural world with many, many different levels of development, is somehow impossible.

Obviously the AFL-CIO and its international affiliates have had a great deal of experience in this, so could you address that question? Is it possible, if we decided we were going to set some standards that were going to be applied, to come up with reasonable standards?

Mr. KIRKLAND. It is not only possible, Mr. Chairman, they exist. There is a body called the International Labour Organization which embraces the full range of human diversity and cultural diversity and ethnic diversity in its membership. Virtually, all the nations of the world are members of that body. It is tripartite. It includes representatives of employers as well as labor, and of governments.

It is the only tripartite body. Every interest is represented there. Every interest that has a stake in the question of labor conditions is represented in there with voting power. It is quite difficult and it takes quite a long time to develop a convention out of that body.

It is an extended process and these conventions do define the basic labor standards that ought to apply to every civilized nation, and those standards are not enunciated unless a strong majority of the members of the International Labour Organization vote for them and participate in their formulation.

So to say that it is difficult to do with this range of divergency is a bad joke. It has been done and it is done.

Chairman FRANK. So that we could take the ILO standards as our basis and—

Mr. KIRKLAND. That has been our consistent position. We are not talking about U.S. standards or the most advanced standards in the world. We are talking always about internationally recognized, basic, minimum labor standards.

Chairman FRANK. The next question that we get again from the people who disagree is, well, what happens when the United States does that and no other nation does and we simply lose out to them? Although when it comes to giving foreign assistance or votes at the World Bank, that argument doesn't have any logical force, but I was pleased that you mentioned the trade union movements in Uruguay, Paraguay, Brazil, and Argentina.

If we were within the Congress to start a movement—one of the problems we ran into last year when we began to do some of these things was resistance in some of the European countries—what would the prospects be for kind of a coordinated effort to work with the trade union efforts of these other countries so that we would be able to increase the number of nations that took a common position in this regard?

Mr. KIRKLAND. I think there are several steps and channels that ought to be followed. I do believe that in the absence of any multi-lateral agreement on the proposition that the oppression of human beings is in itself an unfair trading practice and ought not to be tolerated, that we, as a free and independent nation, have the right to decide that that is, however, a condition for the introduction into the American marketplace of the goods of those countries.

That is not a question of whether or not other countries will imitate us. That is a question of our own standard of basic simple human decency.

One, we have done that in principle at least if not in enforcement. It is that proposition that is contained in the Omnibus Trade Act. It is contained in the Caribbean Basin Initiative. It is contained in the legislation governing the Overseas Private Investment Corporation. It is required to be incorporated now under our laws and every contract of insurance that the Overseas Private Investment Corporation negotiates with private companies.

We are not satisfied with the extent of its enforcement, but the existence of those provisions in section 301 of the Omnibus Trade Act and in the other legislation has proven to us to be a very important lever in influencing the policies and the practices of other countries. They are deeply concerned.

Every year when we submit our cases, as we can do under these laws, if certain countries should be denied privileged access to the American market because of their practices, because of the abuse of human beings, they pay attention. I am visited by their representatives who will argue that they are going to make changes next year. It is effective. It is useful.

Second, I have argued with my colleagues in Europe, among the European trade union movements, that to reinforce the universal desire among trade union organizations in the world, that this principle should be incorporated universally, that we will begin to make progress, more progress in this direction if those democratic countries would imitate what we have done in this country; that is, to incorporate the requirement that minimum standards of labor rights be a condition for privileged access to their markets.

If more and more of those markets begin to follow that process, I think we will make a giant step toward getting it effectively incorporated into a universal mode to multilateral agreements.

Third, we have joined with the trade union movements of every other democratic country in this world represented in the International Confederation of Free Trade Unions, represented in the OECD year after year after year with the consistent advocacy of the proposition that there should be a labor rights clause incorporated in the universal trade agreements, most particularly at the GATT level; that that should be defined, abuse and denial of those rights should be clearly defined as in itself as damaging and in fact far more damaging an unfair trading practice than the imposition of mere tariffs and taxes.

Chairman FRANK. Mr. McCandless.

Mr. MCCANDLESS. Thank you, Mr. Chairman.

Mr. Kirkland, I can't quarrel with the direction that we would like to take. I keep coming back to the reality of life and the fact that different societies have different standards of living and that those standards of living, by the principles or the standards of that particular society, are acceptable if they are such and such, which is far below what it is we have or would like to see that country have, and you touched upon that very briefly in your comments.

There now is an economic value in European companies moving to and manufacturing in the United States for purposes of distribution and sale of their commodities over and above the cost of that particular commodity in the native country, which is somewhat reminiscent of what you and Mr. Gephhardt have talked about where our people have moved to other countries to conduct business because that it is not as costly to do business there.

That is a statement, so the question would be when we talk about standards, basic standards of working conditions, and you say these have already been established, do I understand you to mean that if we are talking about a given country or a given region, that the organization that we have been referring to has established what they consider to be the basic minimum standards for that society or part of our world?

Mr. KIRKLAND. What I have said, sir, is those standards have been developed on a universal basis with the full participation of those countries, including the lowest of the low. They signed off on them and those conventions were adopted. They participated in the

process of formulating those, so you cannot argue "Well, these countries are different so they ought to be exempted from them."

They should be required to observe them, but we are simply asking them to observe what they participated in promulgating.

Mr. McCANDLESS. Let's take your example however sad it may be. One would assume that Thailand had signed off on some kind of a basic minimum standard, but that in your example, you said this particular factory was purposely put there for various reasons and that what happened was a part of the surrounding environment of that operation.

Then what we are saying here is Thailand kind of, oh, spoke out of both sides of its mouth; "Yes, we want minimum standards, but we are going to do whatever we want to at home."

Mr. KIRKLAND. That is precisely it. You put your finger on the problem that causes us to argue that these standards should be directly related to conditions of trade, that the teeth that should be put into those standards must stem from access to markets.

The ILO process involves that process of review of the application of the standards that are adopted at the ILO, but there is no ultimate sanction other than a meeting of the Applications Committee, the hearing of complaints that standards and conventions that were ratified by those countries have not in fact been lived up to.

It is a rather circumspect process that specializes in the most circumspect language of criticism that you could possibly dream of, but that is the process. That is the so-called enforcement. There is no enforcement.

The question is—and this is the key question—is it not time and then in light of the conditions that prevail over so much of the world, should we not meld the issue of trade and the conditions of trade with those standards?

The answer that we put forward is most definitely, yes.

Mr. McCANDLESS. Are you talking about free trade agreements or most-favored-nation agreements or are you just talking about just plain trade?

Mr. KIRKLAND. All of the above, sir.

Mr. McCANDLESS. Thank you.

Thank you, Mr. Chairman.

Mr. KIRKLAND. There is no such thing as just plain trade. The Omnibus Trade Act conditions most-favored-nation treatment. That is privileged access to our market for any trade, on the principles set forth in section 301.

Chairman FRANK. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I had indicated to you that I probably wouldn't have a question, but Mr. McCandless actually started me thinking about something that I—

Chairman FRANK. I didn't consider it a commitment, so it is all right. The gentleman may proceed.

Mr. WATT. That I wanted Mr. Kirkland to address.

I, like you, obviously share our objective of raising standards in other countries, but a number of us have expressed, in the context of the NAFTA debate, a continuing concern that at the same time we are trying to raise other countries' standards, what may be hap-

pening as much, if not more, is that the U.S. labor standards, certainly wage standards, seem to be harmonizing down.

I wonder if you would care to comment on that aspect of it as a concern or whether you are experiencing any of that in this international context; and if so, to what extent?

Mr. KIRKLAND. Certainly, there have been many jobs that have disappeared in this country or jobs that ought to have been created that have not been created, which is an equally important fact at a time of heavy unemployment and the lack of opportunities for so many people.

Because of the ease with which multinational corporations decide where to locate their firms, capital is infinitely mobile. Today it can be moved anywhere around the world with a push of a computer button.

Workers are not mobile or not so mobile. Workers are rooted in their communities; capital is not. That is the great disparity. Workers stand or fall with the human community.

Corporations, capital, can make a separate peace with any conditions that exist anywhere and profit from it. The question is what should drive national policy?

I have no illusions that the fine people who run corporations have any other crucial obligation or commitment than to make the most money wherever they can, nor do I think that that will cease to be their primary objective and everything they do and profess confirms that view.

I don't expect that to change. I don't expect to successfully do much missionary work or moral uplifting to give other consideration in that area. What bothers me is that is so often identified with national interest. It is not national interest.

For what purpose were nations created? For whom do they exist in a democracy? The great disgrace is that those considerations that govern their decisions are so often identified and put forward as the national interest. And I believe that the national interest should be driven by all of these other considerations and the basic question of the fact that nations exist to serve people and all the people.

Companies should get their fair shake, but God Almighty, so should the people who work for them.

Mr. WATT. Thank you, Mr. Chairman.

Thank you, Mr. Kirkland.

Chairman FRANK. Mr. Huffington.

Mr. HUFFINGTON. I don't have a question, but I have a statement.

I would like to welcome Lane Kirkland to our hearing. Mr. Kirkland is a man of intellect and integrity and a personal friend of mine and he is just—you know, we don't always agree on every issue, but I always respect everything you say.

Mr. Chairman, I am delighted that we are having these hearings because I think that government-funded financial institutions that do business overseas should, in fact, take account of workers' rights, human rights, and the environment. I spoke out on that issue the other day when we were discussing Austria and the nuclear plant being built next door that was not the latest technology.

I also wanted to make a comment about China. Both you, Mr. Kirkland, and the majority leader, brought up China. I have great respect for the Chinese people. I think they are wonderful, industrious people. It is their leadership I have a problem with. It is quite a dictatorial regime.

I also have a major problem with Tibet. I mean, thousands and thousands of people are being wiped off this earth, and I am not in favor of most-favored-nation trading status with China until they change their ways.

I hope that the Administration and the Congress will look very carefully at that because it does affect the workers in China and it certainly affects the people in Tibet, so I am delighted you are having the hearings. As always, this is one of my more interesting subcommittees.

Thank you, sir.

Mr. KIRKLAND. May I comment on that, Mr. Chairman?

Chairman FRANK. Yes.

Mr. KIRKLAND. On the matter of China, I was interested in, of course, Majority Leader Gephardt's remarks and I subscribe to them. I would carry them further. I think the situation with respect to China is such that I simply find it hard to understand why this is even debatable as to whether this country—China—should qualify as having made sufficient progress in pursuit of human rights.

In fact, the situation is so far from making progress that it has regressed. Mr. Gephardt mentioned as one of the criteria, the question of free immigration. We have insisted that is not adequate. It wasn't adequate in Jackson-Vanik. It was not adequately applied to China.

It is not simply a question of being able to exit a country. That right should encompass the freedom to exit the country and to return to that country unharmed, which is even more important.

I met yesterday with a friend and a person with whom we are proud to be associated in his struggles, Han Dongfang, a Chinese citizen who suffered in prison after Tiananmen Square and he was involved in Tiananmen Square as a leader. He was a person who, with great, enormous risk to himself and all of his friends and family, is doing whatever he can, committing all of his waking time to the promotion of the beginning of an effort to create an autonomous workers' union in China.

He has sought simply to get back to China. They refuse him admission, to a Chinese citizen with every right to return to China. He wants to do it, fully knowing that his life will be at risk once he gets back in, but he wants to go there and fight for the trade union, the simple right of working people, to have their own representatives.

Now, I tell you one other thing that ought to somehow be weighed in the scales of this decision. It is not only China that is guilty, but it is those corporations and those associations that are so deeply involved in the China-United States relationships and who are arguing today for renewal of MFN for China on commercial grounds and all of the considerations that flow from that. They are equally at fault.

The fact of the matter is that the Chinese government and some of these corporations—many of them and not just American corporations but Australians and others in these special trade zones—are entering into agreements and commitments together that if these firms locate in those zones, they will not have to deal with any trade union whatsoever, including the official Chinese state unions.

Chairman FRANK. I thank you, Mr. Kirkland.

Let me say in closing, you mentioned the refusal of the international financial institutions, other than the European Bank, to consider that human rights and democracy are relevant. Particularly with regard to the ILO statutes, one thing we can do—it would be within our jurisdiction to initiate legislation that would instruct the American executive directors in all those institutions to vote against a loan to any country that was not in compliance with the ILO standards. My inclination would be to push that here if, in fact, we could get some of the Western European nations, perhaps with some trade union support, and we might wind up with a majority.

Even though they say they have to change their statutes, we can do it by changing the instructions. Based on what you say, I am inclined to think we might get a lot of support on this subcommittee on that. We may get back to you.

If we were to do that and we were able to obtain the support of a few other countries, we would be able to require those institutions to use the ILO standards, whether their chief executives liked it or not, simply by having enough votes on the boards of directors.

Mr. KIRKLAND. You are absolutely right, Mr. Chairman. One of the things that bothers me and I find frustrating in the current environment is the tendency of governments—including our own—to treat the IMF and the World Bank as though they were some free-floating mechanism out there totally independent.

Chairman FRANK. You mean like the Federal Reserve?

Mr. KIRKLAND. Yes. In fact, Michel Camdessus and Lewis Preston are not just people who just parachuted in from heaven, you know. We, the United States, made the decision as to who should be elected to those posts.

We also decide who is on the governing body. These are not independent civil servants. They respond to the policies given to them by their governing institutions and we are participants in that and I believe that we should use that leverage as well as the money leverage that stems from the fact that we are the largest single contributor to those organizations.

Chairman FRANK. We can do that if we put through legislation that is binding on our executive directors at those institutions. We may be back asking your organization and others to send us some witnesses for a hearing on a bill to make the ILO standards binding on the American executive directors.

Any further questions? If not, we thank you, Mr. Kirkland. It has been very fruitful and it is something we will be returning to.

Our last witness is Mr. Durwood Zaelke. We appreciate very much Mr. Zaelke joining us to represent the Center for International Environmental Law. Mr. Zaelke, please proceed.

**STATEMENT OF DURWOOD ZAELKE, PRESIDENT, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW**

Mr. ZAELKE. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to testify at the opening hearing where we get to look at some of the bigger issues. I would also like to commend the subcommittee for their fine work on MDBs, another area that we follow very closely, in particular, the success of the independent Inspection Panel.

A look at the big picture should start with a look at the environmental status quo and the recognition that it is untenable, and I refer here to a couple of articles that all of us should read: Kaplan's piece in the *Atlantic Monthly* from last month on the coming environmental anarchy, and Lester Brown's "The State of the World" and "Vital Signs," talking about the coming food shortages. These present truly frightening environmental dilemmas.

When reading these articles, we should focus on the fact that the market economy that we have been talking about regulating and the reach of law often don't have anything to say to these types of environmental problems where we are faced with anarchy. That suggests that where the law does reach, we should do an especially good job in making it effective.

The big picture also must look at the role of the market in our environmental predicament and the recognition here is that the market fails by failing to internalize environmental costs. This, of course, is the role for law, especially environmental law.

But even in our most sophisticated countries, including the United States, where our environmental laws are among the strictest, we are still not keeping up with environmental degradation, let alone beginning to achieve ecologically sustainable development.

Many of us assume if we meet the U.S. standards and we apply them globally, we will solve our problem. In fact, this is not the case. We have much further to go.

Our environmental standards were not designed with sustainable development in mind. They are not currently capable of achieving this ultimate goal. We need to go back to the basics regarding environmental standards, the fundamental principles of ecology.

As lawmakers, you can change the rules for the market by the way you design the rules that regulate the market, but you cannot change the rules of ecology. These rules must be the touchstone for environmental law, for regulating the market, both internationally and domestically.

We need to look through the prism of ecology to redesign our laws to ensure that they are made consistent with ecology, beginning with environmental laws, but also including securities, corporate law and, of course, trade law, both domestically and internationally.

In fact, we need to develop a whole new school of thought on law and ecology similar to the Chicago School of law and economics, in fact, as a counterpoint to the Chicago School.

If ecology is our compass and shows us the way, we still need an engine to get us there. Here we need to rely to a considerable extent on the forces of the market, carefully regulated under law.

To quote Paul Hawken of Smith & Hawken Co., "[b]usiness may be the only mechanism on the planet today powerful enough to

produce the changes necessary to reverse global environmental and social degradation."

If we have the compass and we have the engine, then we still need a steering mechanism, and here I would propose the beginning of a steering mechanism in "competitive sustainability," designed to promote environmental standards as an element of competition. So we can use competitive forces to reward the firms and the countries at the higher end of the environmental spectrum, those that are already emerging, those that already exist.

Competitive sustainability would be a mechanism for realizing sustainability through the upward harmonization of domestic and international environmental standards, using the competitive forces to create a level playing field, at consistently higher levels of environmental and social protections.

We saw some elements of this emerge during the NAFTA debate. Environmental standards in the United States were much higher than in Mexico. That became the fulcrum. Trade was the lever and we managed to raise the environmental standards of our trading partner in Mexico. Of course, we must follow through with vigorous enforcement or this will not be satisfactory. In fact, the standards themselves may not even be satisfactory.

We also see competitive sustainability or elements of it emerging at the firm level where competitors will use environmental standards against one another. When I was at the Department of Justice bringing enforcement actions, I would make a case against one company and the first thing they would do when they saw the evidence would be to say "I have seven competitors, and I will tell you precisely what their problems are so you can bring actions against them to keep the playing field level."

The specific steps that might be useful to guide us toward this competitive sustainability start with the very obvious one—one economists and trade folks and environmental folks all agree on, and that is greater cost internalization. This is the whole goal of environmental law: to internalize environmental costs. This can be done through command and control, in crude ways, or through elegant taxes and fees, where that is possible, which may be even more efficient.

Representative Gephardt mentioned the Blue-Green 301. This seems like one very important mechanism for incorporating these costs and for relying on the forces of competition to assist in the enforcement actions. In fact, it has always seemed somewhat of an anomaly that we have in the antitrust field very sophisticated private enforcement damages, treble damages, one competitor against another.

This could be something that might be looked at, to extend to environmental standards competition, where we can't internalize environmental costs because the law is not quite ready to do that or the political will is not there.

At a minimum, we should be measuring environmental costs so that we will know what the deviation is from where we need to go to internalize and where we are today. This is very, very important. We also need to perfect life cycle analysis. This has great promise, but, of course, it bumps up against the GATT rule that

prohibits production and process methods as a means of regulation. This is something that the GATT working group must take up.

The United States should be a leader on this and the change should be made to allow life cycle analysis and other production process method regulations.

Environmental labeling is another very important measure short of full cost internalization: disclosure to the consumers; disclosure to the firms; disclosure to the regulators. And, of course, there are efforts to revise our national accounting system without changing in a regulatory way what we could do, at least know how we are spending our environmental capital. That seems quite important.

Then there is environmental law. Because environmental law does internalize environmental costs, it is the principal mechanism for controlling the market. It seems not only do we need to revise laws to incorporate principles of ecology, but we need to monitor extremely carefully the environmental laws of all of our trading partners.

We need to get those laws. We need to translate those laws and analyze them and we need to see how well they are being enforced. If we are going to have a Blue-Green 301, we would need that information to determine deviance from the standards that we think are appropriate.

This information would also be tremendously useful to U.S. exporters, especially environmental goods and services exporters whose whole market is driven by environmental law and regulation.

This information would also be very useful to MDBs. It seems that the World Bank, the other multilateral development banks, should all have the information on national environmental laws. As they make loans in specific countries, they should be incorporated into the loan agreements and in fact they aren't. It is not done and this is something that I would encourage the subcommittee to look at.

Another point that I would stress is vigorous environmental enforcement, and here the subcommittee might look at the reach of U.S. jurisdiction. We have the most sophisticated and rigorous judicial system in the world and it could be extended, it could be broadened to entertain further claims in the international arena. We can let more people into our courts, and I would think there may be great promise there.

We must expand and extend the reach of our law over the foot-loose, mobile multinational corporations. We must find ways to apply home-country standards, for example, in the same sense we use flag-state jurisdiction in maritime law to come up with control of these corporations. If we are going to rely on them as one of the main engines of change, this control is critical.

We also need to expand the role of nongovernmental organizations, and here in particular I would suggest within the countries with which we are trading.

As part of the NAFTA debate, we discovered that there was not a single environmental law public interest group in Mexico. At CIEL, we had the good fortune to be able to help a group create such a public interest environmental law firm just after NAFTA,

just a couple of months ago. We are doing the same thing in Chile right now.

Environmental law movements in other countries must be developed and supported by USAID. They must be supported by our participation in the MDBs so they can get funds and incorporate these folks into the environmental efforts. We will never be able to do what we need to do unilaterally, as powerful as we may be.

I would like to make one more point about environmental law; and that is in the same way that we have educated many of the world's economists in the United States, we should also take up the challenge of educating the world's environmental lawmakers and regulators. If we can reach these folks and train the next generation, we will have a much easier time harmonizing environmental laws in the direction that we want.

Finally, there are a couple of multilateral mechanisms. The issues I just mentioned apply both domestically and internationally. There are two specific multilateral mechanisms that might be nudged along by this subcommittee. One would be to look at the U.S. Administrative Procedures Act as a model for an International Administrative Procedures Act.

It could be used to guide the actions of, for example, the new institutions set up under NAFTA, the independent Inspection Panel at the World Bank, and also domestic systems. Our Administrative Procedures Act, our constitutional charter for participation in the administrative process, is the best in the world and it could be a great model.

The final multilateral point would be a possible framework convention to address cost internalization so we get the methodologies established to be able to better measure and ultimately internalize environmental costs throughout the globe.

In conclusion, we need to redesign our environmental legal standards until they are consistent with the basic principles of ecology. This includes the U.S. legal system. We must use trade law as the lever and the high U.S. environmental standards as the fulcrum for raising the standards of other nations of the world as we have done with some success with NAFTA with due regard for the need for technical assistance, differential time schedules, technology transfer, and funding assistance which many of the developing countries will need.

This doesn't mean that the goals shouldn't be the same. There are other mechanisms to address the difference and we cannot stop with trade laws. We must use all available legal mechanisms to promote ecologically sustainable development, including bilateral and multilateral aid.

We must redirect our incentives and disincentives in all of the fields of law that we have control over. In fact, we can't stop with the law, of course. We need to promote environmental education and renewed vision of environmental ethics.

Finally, I will confess a personal fear. I am nervous to rely on multinational corporations so heavily as the engine for change and, in fact, disappointed that the self-interest that drives the markets may be our strongest force, but with the careful redesign of law—and here I stress the words careful redesign of law—beginning with

the efforts of the United States, I believe that this is one of the paths that we must take.

Thank you.

[The prepared statement of Mr. Zaelke can be found in the appendix.]

Chairman FRANK. Thank you, Mr. Zaelke.

One point that is new to me, because I am not expert in this, is the obstacle to the appropriate life-cycle analysis in current trade law. Would you expand on that a little bit?

Mr. ZAELKE. This is back to the tuna/dolphin decision. The current GATT and the Uruguay Round as well prohibit production process restrictions.

Chairman FRANK. It is the end result; how you got there can't be taken into account.

Mr. ZAELKE. If it is not incorporated into the product.

Chairman FRANK. That can be changed through the GATT itself?

Mr. ZAELKE. You might. A side agreement would do it or if the United States wants to do it unilaterally, they have just to be the pioneer and take their lumps.

Chairman FRANK. A related question, developing something like U.S. Administrative Procedures Act internationally, how would you do that? What body could promulgate that? I am interested in your mentioning this in conjunction with what we have been trying to do with the World Bank Inspection Panel.

Mr. ZAELKE. There were two suggestions I might follow up with. One would be to start with guidelines that would be developed from UNEP, for example, that is slower and less effective; the other would be a convention, I would suggest, like the Vienna Convention on the Law of Treaties. We need one, such as a Washington Convention on Administrative Procedures.

We have all of these international organizations that are not under the control of law as much as we would like.

Chairman FRANK. I think that is an excellent idea because we can do a lot of substantive things, but absent some common mode of enforcement, they may not mean very much. So one proposal would be an international convention which we would convene to deal with these procedural questions, including, as you mentioned, the Inspection Panel, but that would also be relevant to appeals of denials of information, the whole set of things.

Mr. ZAELKE. The new NAFTA institutions as well.

Chairman FRANK. Yes. That is something where we might want to initiate some aspects.

Let me ask you also the question I asked Mr. Kirkland. If we are able to develop a consensus toward imposing standards as the condition for granting assistance in various ways, and again we should make it very clear the purpose of these standards is not to cut off assistance, it is to promote adoption of standards. We would assume people, if we had reasonable standards, would adopt the standards rather than not take the money. What is your sense about the ease with which we can come up with some commonly accepted environmental standards as a basis for such a set of rules?

Mr. ZAELKE. Well, unfortunately, we don't have the set in place that the ILO has for labor. We do have some World Bank stand-

ards, and you would guess that those might be suspect and, in fact, they are. UNEP has various standards. But my initial point was that we have not developed in environmental law at the national or international level an appropriate set of standards. Yet that must be done and tied much more closely to ecological principles that are immutable.

We have to follow that. However, I do think on a heuristic basis we could fashion a set of principles that would be an appropriate set to begin with and the whole idea of competitive sustainability is to move upward, and this would be something that could be tied in with the bilateral and multilateral systems with technical assistance and so on.

Clearly, it is going to take many countries a much longer time. It doesn't mean they shouldn't start now or that we should not measure deviation starting now.

Chairman FRANK. I think you would agree that the fact that we cannot come out with a fully calibrated set does not mean you should fail to apply some that are obvious right now?

Mr. ZAELKE. Right. We could come up with a set.

Chairman FRANK. We will proceed with it. I thank you.

As I said several times, this is the beginning of a process that I think is going to develop into some legislation before the end of this year. Realistically, I think we will be talking about before the end of this year coming up with legislation that many of us will begin pushing in the next session, but we will start on that now.

Thank you very much.

Mr. ZAELKE. Thank you very much.

[Whereupon, at 3:57 p.m., the hearing was adjourned.]

## APPENDIX

Opening Remarks of

*Congressman Paul E. Kanjorski*

SUBCOMMITTEE ON INTERNATIONAL DEVELOPMENT, FINANCE, TRADE AND MONETARY POLICY  
OF THE HOUSE BANKING, FINANCE AND URBAN AFFAIRS COMMITTEE

*a Hearing on*

*International Labor and Environmental Standards*

March 23, 1994

I was pleased to hear that my colleague, Mr. Gephardt, would be participating in the panel for this hearing, and I commend him for his continuing leadership in encouraging fair labor practices and sound environmental standards by the recipients of financial assistance from international development institutions. During the 102d Congress, I joined with many of my colleagues in cosponsoring H.Con.Res. 246, the Waxman-Gephardt-Sikorski resolution, directing the President to negotiate a GATT agreement which is compatible with U.S. health, safety, labor and environmental laws. I am pleased that Mr. Kirkland also endorses a similar goal in his written testimony to this Subcommittee.

Also during the 102d Congress, I offered an amendment before the Banking Committee to H.R. 3428, the International Trade Bill, including language which would have put "real teeth" into the efforts of H.Con.Res. 246. In the amendment, I directed the Secretary of the Treasury to instruct the United States Executive Director of each international financial institution to use our voice and vote to encourage fair labor practices, provision for health and safety in the workplace, limitations on excessive work hours, prohibitions against child labor, and the preservation of sound environmental standards in the implementation of financial assistance programs to developing nations.

Additionally, I included an important provision to mandate that each recipient nation reach standards in these areas compatible to those acceptable in the U.S by the year 2000. Although this language was approved by a wide margin in the Committee, it was unfortunately not included in the final version that passed the House as reconciled with the text passed in the Foreign Affairs Committee.

For too long our tax dollars have been used to bring our labor and environmental standards down to the "lowest common denominator" used by other nations, rather than to bring the standards of recipient nations up to a level accepted here in the United States, standards that we would deem fit for our families and children.

I commend Chairman Frank for holding hearings on these most important aspects of international development, and I pledge my continuing support in this endeavor. Without any further hesitation, I look forward to the testimony of our witnesses today.

Opening Statement of  
Rep. Bernard Sanders  
Committee on Banking, Finance and Urban Affairs  
Subcommittee on International Development,  
Finance, Trade and Monetary Policy

Hearing on international labor and environmental standards  
Wednesday, March 23, 1994

I want to thank Chairman Frank for holding this hearing on international labor and environmental standards. It is becoming increasingly clear that conformance with these standards produces stronger, more vibrant economies that in turn can spur global economic growth.

The recent passage and implementation of the NAFTA and the possible introduction in the next few months of implementing legislation for the GATT illustrate the prominent role free trade has assumed as a means of achieving international economic growth. Yet for our trade policies to achieve real, lasting success we must go beyond narrow, strict definitions of trade and address broader policy questions such as the importance of international labor and environmental standards.

Countries that do not respect labor and environmental standards are able to attract foreign investment because of their lower labor costs and the absence of environmental regulations. However, the long term costs of such

short-term thinking are very high, including a poisoned environment and an impoverished and often politically unstable working class. Instead, we should encourage countries to pursue policies that result in a more equitable distribution of wealth and foster the development of domestic markets.

Recognition of workers' rights to organize, to bargain collectively, and to strike creates a positive pressure on wages. As wages rise, workers have more income to spend on American-made goods. Simultaneously, as foreign wage rates rise, U.S. corporations will have less incentive to relocate in an attempt to reduce labor costs. Requiring respect for international labor standards will help to curtail the current race to the bottom in which many developing countries sell off their long-term health for short term gain.

I look forward to hearing from today's witnesses, especially on the question of determining the best mechanism for encouraging and evaluating recognition of international labor and environmental standards. To my mind, there are several approaches that could be effective. Loans from the World Bank and other international lending organizations could be predicated upon respect for such standards. The billions of U.S. taxpayer dollars we send overseas every year could be conditioned on conformance with these

standards. And Congress could penalize U.S. corporations that invest in countries that do not recognize international labor and environmental standards.

Additionally, we should include labor and environmental considerations within international trade agreements. The President has indicated his support for this, calling for the creation of a GATT Trade and Environment Committee. Other Members of Congress and I have written to the President to urge him to negotiate binding rules to link respect for fundamental worker rights and labor standards in the conduct of world trade.

The President's Labor and Environmental side agreements to the NAFTA, a marginal improvement over the Bush draft, do not go nearly far enough. The Department of Labor is presently drafting procedures and guidelines for the U.S. National Administrative Office, established by the Labor supplemental agreement to investigate complaints about the violation of worker rights. The Administration has an excellent opportunity to demonstrate its commitment to protecting workers' rights and to upholding international labor standards by requiring the NAO to promptly investigate and review documented cases of worker rights violations and conduct public

hearings.

The effectiveness of the NAO and the Administration's commitment to protecting the rights of working people is being tested by two complaints filed with the NAO by the Teamsters Union and the United Electrical Workers. Since the adoption of the NAFTA the Honeywell plant in Chihuahua has fired more than 21 women for attempting to organize an independent union. Nine workers were laid off for the same reason at the General Electric plant in Juarez. The Teamsters and the UE have asked the NAO to require Honeywell and GE to reinstate the fired workers and allow Mexican workers to choose union representation without fear of reprisal.

Of course, the United States must also abide by such international standards. We can not call for the compliance of other countries when we allow the permanent replacement of strikers, when working people are repeatedly forced to make concessions to maintain employment, and when the real hourly wage rate of production workers is declining despite an increase in industrial production. We must ensure compliance with international standards here in the U.S. before we promote them abroad.  
*if we are to be aspible to*

Mr. Chairman, I look forward to hearing this afternoon's testimony.

Thank you for drawing attention to the important role international labor and environmental standards can play in ensuring equitable international economic growth. I look forward to working with you on this issue in the coming months.

## NEWS FROM THE HOUSE MAJORITY LEADER

For Release Upon Delivery  
March 23, 1994

Congressman Richard A. Gephardt  
H-148, U S. Capitol

Testimony of  
House Majority Leader Richard A. Gephardt  
before the  
Subcommittee on International Development, Finance and  
Monetary Policy  
March 23, 1994

Mr. Chairman and members of the Subcommittee:

I thank you for this opportunity to testify today. And I take the opportunity very seriously. The fact is, more and more, the good work of this Subcommittee is at the very center of the debate on America's economic leadership -- both at home and abroad.

I was gratified to see, from your formal notice of this hearing, that you recognize trade is far from a narrow, economic issue. You understand that when we talk about the dollars that flow across our borders, we've got to talk about ways to use those trade and development dollars to promote international labor and environmental standards. I would add to this list the crucial goal of promoting human rights and democracy around the world.

Mr. Chairman, these days, there is a heated policy debate about the kind of leadership America should demonstrate in our new world economy. Despite the growing tensions in Korea, Bosnia, and so many other nations, the Post Cold War world is, at its heart, not so much about military competition as it is about economic competition. Increasingly, the strength of a nation is measured not in missiles, but in markets.

But at the same time, the goal is not simply to enter these markets -- the goal is not simply to chase the lowest wages around the world, to find new excuses to move jobs and opportunities overseas. As we play a greater role in the emerging economies of the world, we've got to bring to the table not just dollars, but values. We've got to export not just our corporations, but also our compassion.

We've got to push developing nations to make basic human rights, and workers' rights, part of the bargain.

This is a moral issue. Because if we don't honor the world's workers -- if we don't care about them, and invest in them, and empower them -- then we're abandoning our highest mission, as a government, and as a people.

But it's also an economic issue. If workers don't share in the fruits of their labor, how can they buy our products? How can they sustain new growth and opportunity? How can we create a new middle-class throughout the world? And how can we save our workers from a devastating downward spiral, one that will only wound our global economy?

If we keep insisting on false distinctions between the needs of our wallets and the needs of our people, we're only going to compromise both.

The same is true of the environment. Words truly cannot describe the levels of pollution in many developing countries. It's wrecking the planet -- and it makes it hard for American companies, companies that must follow our strict and sensible laws, to compete.

Many of these nations do have decent laws on the books -- labor laws, anti-pollution laws. But they're not being enforced. So I will soon introduce a new bill, called Blue and Green 301. This new law would say: if you don't even enforce your own laws -- if you abuse your workers, misuse the environment, and make it hard for nations with a conscience to compete -- that's an unfair trade practice, and we're going to call you on the carpet.

There's much more we should do to make sure that trade lifts up the people of the world.

We should form working groups within the GATT on the environment and on workers' rights -- groups with a real plan and a real mandate -- because every responsible nation must play a role. And I believe this should be agreed to before we actually sign the GATT this April 15th.

We should inject new life into the International Labor Organization, which will soon celebrate 75 years of progress.

We must recognize that the linkage between our economic interests and human rights, labor rights, and the environment simply cannot be broken. In the long-term, these interests represent separate tiles in the mosaic of our domestic and international economic policies.

Of course, some believe that all tiles are not created equal -- and that development must be our first priority, with democracy to follow when the moment is right. They say that development breeds democracy, and that we should think twice -- even three or four times -- before giving any other interest the same kind of weight.

But while we can never ignore the fact that development breeds democracy, neither can we abandon our nation's commitment to development through democracy.

And if the United States doesn't use its moral and economic leverage to lead the world, to push for a new fusion of all our interests, who will?

Look at what happened in Chiapas, Mexico. Too many policy-makers were afraid to confront the basic injustices of Mexico's political system -- the rights abuses, the lack of real representation.

This January 1st, the people rose up and demanded economic opportunity -- and it took a painful armed conflict to get the government to finally listen.

At the same time, if the working people don't get a piece of the pie -- if the workers at a Mexican television factory live in shacks made of the packing material of goods they produce -- how can we create the consumer class that fuels growth and opportunity, from Bangkok to Beijing to the Beltway of Washington?

That's why we must press the cause for human rights, and workers rights, and basic justice -- in China, and all over the world. It makes good moral sense, and good economic sense as well.

We must also focus special attention on our participation in the Multilateral Development Banks. We need to use these M.D.B.'s as catalysts for change -- not simply protectors of the status quo.

Throughout the 1980's, trade and structural adjustment policies focused on transforming many lesser-developed economies into market economies, with particular attention to the privatization of the public sector, reform of capital and money markets, and stabilization of macroeconomics. Unfortunately, these economic policies ignored the crucial missing link -- labor market and social policies.

What's more, in the case of Latin America, social conditions in the region deteriorated, real wages fell in almost all countries, and the middle class inched closer and closer to poverty. As you might expect, the extreme poor shouldered the greatest burden of all the structural adjustments, and the region's poverty rates went through the roof.

The Multilateral Development Banks have responded to these social crises with a number of programs. The Social Emergency Fund, first established in Bolivia by the World Bank, and now in place in many countries in the region, provides basic social services to the poor. Youth training programs in Chile and throughout the region -- funded by the Inter-American Development Bank and the Multilateral Investment Fund -- support basic skills training and labor market assistance to both lower-income youth and displaced workers.

However, I believe much more can be done to promote labor market reforms, and to encourage real policy progress in these countries.

I think the goals are clear: reforming and strengthening collective bargaining arrangements. Re-orienting training and wage policies to promote and reward productivity and hard work. Greater worker participation in the workplace.

All of these are essential to developing a globally competitive workforce -- in that region, and all across the globe. That's why these kinds of labor market policies should be a top priority in trade discussions. And I believe the M.D.B.'s can play an important role in promoting these policy reforms.

What we're really talking about is trade policy with a human face. Trade policy that raises the standard of living in these countries -- and ultimately, in our own country as well.

I believe we should use our Multilateral Development Banks to say: we know there are short-term costs to workers rights and economic justice -- and if you do your share, we'll give you special loan rates to help you along. At the same time, we need to take a good look at those who are receiving our M.D.B. dollars, to make sure they are truly and aggressively pursuing these policies.

We need to urge the African Development Bank to be a real catalyst for change in South Africa. We're now on the eve of free elections in South Africa. We should be proud that our policies have helped to promote change and democracy, and have brought the evil empire of Apartheid to the brink of the grave.

We need to move in quickly, to see that our hard-fought victory really lasts. The African Development Bank needs to help promote growth and opportunity in South Africa -- starting the day after the election.

The Administration must find a way to address the enormous debts we have to these institutions -- almost 850 million dollars -- so that we can pursue these goals -- with the assistance of other nations.

Some Members of Congress are reluctant to support increased assistance for the M.D.B.'s. -- and I can understand why. We have quite simply failed to spell out our goals and interests in the M.D.B.'s. And members have a right to demand that our dollars promote real growth, real equity, and real opportunity in the nations we help, so that they can turn to their constituents and say: "I honestly believe that this is in your best interest."

It's time to recognize that traditional approaches won't work in a rapidly changing world. Our interests aren't static, they're dynamic. It's time for us to create a vision of the future, and develop the policies to get there. It's time to discard the dated, dogmatic economic theories of the past, and understand the linkage among all of these policies.

#### Conclusion

In a world of economic instability and interdependence, there are no easy answers. There are no quick fixes. There are no catch-all paradigms or New World Orders to organize every decision -- to tell us how much progress justifies a trading preference, or what kind of rules and laws bridge the gap between a last-minute concession and a long-term commitment.

But what is clear is that America -- the greatest, and freest, and most admired democracy -- didn't get where we are today by building a wall between our economic wants, and our people's needs. We didn't get where we are today by holding out a carrot to injustice, but throwing away the stick.

It's time to fuse our international trade with our indivisible principles -- because when you really think about it, there's no way we can separate them.

It's time to make clear that those of us who were sent to Congress to defend the rights of hard-working people cannot let those rights wither away.

And it's time to realize that if the world's economies are becoming intertwined -- if our economic affairs are becoming intermingled -- then so are our people. And so is our obligation to help our people.

You might call it Capitalism with Compassion.

You might call it Development through Democracy.

Or you might just call it good, old-fashioned common sense.

But in a world of shifting alliances and growing uncertainties, it's the most profound obligation we have.

And in an economy in which our people are the only advantage we can really hold onto -- it's the best investment, and the surest commitment, we can ever hope to make.

Thank you.

# # #

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**Testimony of Lane Kirkland, President  
American Federation of Labor and  
Congress of Industrial Organizations  
before the  
House Banking, Finance and Urban Affairs Committee  
Subcommittee on International Development, Finance, Trade  
and Monetary Policy**

**Washington, DC  
March 23, 1994**

Mr. Chairman, members of the subcommittee, thank you for this opportunity to present the position of the AFL-CIO on this critically important issue.

In our view, the question of whether labor and human rights standards should be part-and-parcel of our bilateral and multilateral trade agreements has long been settled.

Look at the history, if you will. Where such standards have been pressed and tested and pressed again, without flinching or retrenchment, they have been instrumental in helping ordinary working people cast off the yoke of totalitarian repression.

Look at the former Soviet Union. You see democracies emerging there today because the western democracies refused to incorporate a repressive system into the channels of world commerce.

Look at South Africa. Does anyone doubt that next month's non-racial elections would be taking place had it not been for the application of international trade sanctions?

And look at Chile. Today it is a democratic country because its working people courageously demanded their freedom and the United States sided with them in revoking their oppressors special trade privileges.

With regard to international financial institutions, just look at the overwhelming success of the Marshall Plan, which included a strong emphasis on the forging of democratic governments and the democratic institutions that make up civil society.

These events have given body to the idea that freedom comes not from up high -- not from the ministries and counting houses of the elite -- but from the ground, from the workplaces and the streets, wherever ordinary people stand up and declare that they mean to live on their feet and not on their knees.

We simply ask that U.S. policy toward international trade and financial matters serve these aspirations, and not those of the complacent elites and grey establishments of western society. We think there is compelling reason, both moral and practical, for pursuing that course.

In light of the evidence, Mr. Chairman, I think it is safe to say that it is not for this subcommittee, or the Congress or the administration or anyone, for that matter, to make a determination of whether trade should be "linked" with basic human and worker rights.

The linkage is already there. Capital flows freely across borders and enables flagless, stateless corporations to shop the world for the cheapest, most oppressed labor. To say that the question of human and worker rights somehow stands totally apart from all this is to deny reality.

Of course, there continue to be those who would have us believe that freedom of democracy are borne on the wings and in the pockets of capital -- and that cumbersome language about the basic rights of human beings only gets in the way.

They've always been around. Industrialists the world over thought Franco was wonderful. So was Pinochet. Hitler and Saddam Hussein were, among many other things, men you could do business with.

I recall the words of an American banker who reacted to the 1981 declaration of martial law in Poland, and the arrest of Solidarity's leaders, with these words: "Who knows which political system works? The only test we care about is: Can they pay their bills?"

We have no quarrel with capital and markets, as such. Trade unions emerged from them, learned to live with them and become the instruments through which they are humanized.

But we do not harbor any illusions, either. Just as we do not expect governments to reform themselves, we do not expect the pursuit of profit to embrace a loftier mission. That is why we look to the organization of independent democratic institutions to advance the interests and aspirations of ordinary people against hostile state power and entrenched privilege.

The problem is that this goal is not served by the agents of private enterprise when they are left to their own devices, and its advancement should not be entrusted solely to them.

That is the reality of market economics. It has created a situation where Malaysia, a country that has lured dozens of multinational corporations with promises of cheap, docile labor and the banishment of free trade unions in so-called "export processing zones," stands to lose its industries to China, the government of which is steadfast in its determination that it will not be outdone in the repression of human beings.

As another example, I give you last year's toy factory fire in Thailand that killed nearly 200 workers. Most of them were young women, working long hours at low wages, making toys for the children living in countries where the conditions that lead to such tragedies would never be tolerated.

That was no accident. On the contrary, the dismal wages and conditions in that factory -- and particularly the government's toleration of them -- were precisely the reason that factory was located there in the first place.

And while the American toy importers were washing their hands of all responsibility, that event did not diminish their vigorous opposition to our attempts to have such exploitation declared an unfair trade practice and to deny special trade benefits to governments that tolerate such atrocities.

Our experience is that there is no despot on Earth that good gentlemen of commerce will shun if there's money to be made. And there is no limit to the depth that so-called "market pressures" will drive wages and working conditions in the absence of enforceable standards on freedom of association, the right to organize and bargain collectively, the elimination of forced labor, a minimum age for child labor, and acceptable conditions with respect to minimum wages, hours of work, and occupational safety and health.

This is why such standards are needed and why they should be incorporated in trading agreements between nations.

Its not only the moral and just thing to do, but it also an economic imperative.

Around the globe, the labor of millions of men, women and children is still obtained by means of force, intimidation or sheer desperation. Many live or die solely at their employers' discretion. These workers are neither players nor beneficiaries in the international "free market" system. They are its

pawns.

The economic consequences are a matter of plain, common sense. If workers don't earn enough to purchase the goods they make, you will end up with too many workers with too little money, chasing too many goods and services.

Today, developed and developing nations alike are trying to cope with the results -- chronic unemployment and underemployment, social and political destabilization, growing income inequality, and declining living standards.

On the other hand, the democratic experience has shown that workers who are free to pursue their fundamental rights through their own democratic institutions have been remarkably successful in building the strong consumer markets that support industrial growth and development.

The choice is clear. And we believe there are a number of steps the United States government should take in order to pursue the right course.

For one, the United States should increase its unilateral efforts to enforce worker rights standards. By that I mean those standards that are already incorporated in U.S. laws governing the Generalized System of Preferences, the Overseas Private Investment Corporation and the Caribbean Basin Initiative.

These standards should also be incorporated in all future bilateral and multilateral trade agreements. They should be genuine and enforceable -- and not fashioned after the weak and ineffective side agreements to NAFTA.

I would note that the AFL-CIO recently sent a delegation to meet with the trade union movements of Chile, Argentina, Paraguay, Uruguay and Brazil, regarding potential free trade agreements with the United States. Let me tell you that they want no part of NAFTA and its paltry language on worker rights. They want separate agreements that contain strong, enforceable standards. And they have pledged to stand with us to secure those standards in any future trade agreements with our country.

Meanwhile, at the international level, the United States should redouble its efforts to push the GATT countries to adopt a social clause that requires member nations to respect basic, internationally-recognized human and worker rights.

We also believe it is time for the Congress to instruct the executive

branch to use its voice and its vote on the boards of the international financial institutions to ensure that these institutions serve, and do not undermine, the purposes for which democratic governments are brought forth -- and that is to serve the aspirations of ordinary people for freedom, a better way of life and a fair share of the fruits of their labor.

Specifically, we should push to ensure that government accountability and worker rights criteria are factored into decisions on the provision of loans and grants and their subsequent assessment.

Our government should also be taking these criteria into account in its own decisions on how to allocate its limited foreign aid budget.

Mr. Chairman, I could go on. I could give you chapter-and-verse about the ill-considered "shock therapy" policies of the international financial institutions and their detrimental affects on nations of people who have suffered for decades.

I could talk about why the brutal dictatorship in China doesn't deserve to be treated as any democratic nation under our tariff system.

But I think it's best if I stop here and answer your questions. Thank you for the opportunity to appear before you.

TESTIMONY OF DURWOOD ZAELKE, PRESIDENT,  
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,

PROMOTING ENVIRONMENTAL STANDARDS  
THROUGH TRADE AND OTHER LEGAL MECHANISMS

March 23, 1994

Chairman Frank, members of the Subcommittee, thank you for the opportunity to testify today on the issue of environmental standards and trade.

My name is Durwood Zaelke. I am the President of the Center for International Environmental Law (CIEL), as well as an Adjunct Law Professor at the American University, Washington College of Law, where I also co-direct the joint CIEL/American University Research Program on International and Comparative Environmental Law. A list of CIEL's recent research publications on trade and the environment is attached, as is an announcement for a workshop we are hosting March 25 at American University on Chile and NAFTA.

I am particularly pleased to be able to testify at your opening hearing, where you have asked that we keep the big picture in mind. I am afraid that too much of the debate recently has focused on efforts to reconcile the technical rules of trade and the environment, at the expense of the more fundamental question, which I would pose as how to use law, including trade law, to promote environmental standards to achieve ecologically sustainable development.

I would like to begin with some comments on market failures and the untenable environmental status quo, as well as the efforts to date of environmental law to address these failures and protect the environment. And then offer suggestions for change, focusing on the opportunity to develop a model of economic development CIEL is calling "competitive sustainability." A more complete treatment is provided in the attached article.

## Market Failures and the Untenable Environmental Status Quo

Our market-based economic system performs many wonders, and has long been emulated throughout the world. But here and elsewhere the market fails the environment. This is the basic lesson of environmental economics; most environmental costs are external to the market.

The services the environment provides, for example, assimilating pollution, are either free or grossly underpriced; and natural resources also are often free or grossly underpriced, for example our fish stocks. And because the environment is not properly priced, it is overused and abused.

Environmental law and regulation, and the standards they impose, basically are efforts to internalize these external environmental costs. We do this, or rather I should say Congress and other lawmakers do this, sometimes through command-and-control mechanisms, and other times through market-based economic mechanisms, including taxes and pollution charges, which in some circumstances can be more efficient.

The result is a regulated market. We often refer to it as a free market, meaning unregulated, but in fact the market is heavily regulated. Over the past 25 or 30 years in the US we have developed a detailed and complex set of environmental laws to regulate the market. For a good deal of this time environmentalists believed the market and industry were truly the enemy, and fought tooth and nail for strong command-and-control laws.

Not too many years ago, there seemed to be the beginning of an accommodation between environmental protection and industrial development, with some leaders of industry recognizing that environmental protection was necessary and good, and some environmentalists recognizing that we might begin to look for more efficient ways to achieve environmental protection that would give industry greater flexibility, at least regarding conventional pollution where there are no irreversibilities.

This looked to be a happy period; we environmentalists had won a good deal of the environmental protection we wanted, and now we could begin to consider efficiency and flexibility. Only we were wrong. We were winning many battles, but we were losing the war. We were nowhere near the real goal of ecological sustainability. Nor was the environmental law system we had helped develop designed to get us there. And we had barely begun to consider the global picture, including international trade.

What we see today, if we look clearly at the state of the environment, is truly frightening. (Here I would refer you to Robert Kaplan's article on the coming environmental anarchy in last month's Atlantic magazine. Also Lester Brown's *Vital Signs* and *The State of the World*, describing how the world is running out of food.)

Current growth trends in population and economic development cannot be sustained within the limits of our ecosystem, even with the most optimistic projections of technology advancement. Still more troubling is the fact that the scale of today's development already appears to be overwhelming the ecosystem that sustains us all.

"Further growth beyond the present scale," according to former World Bank economist Herman Daly, "is overwhelmingly likely to increase costs more rapidly than it increases benefits, thus ushering in a new era of uneconomic growth that impoverishes rather than enriches."<sup>1</sup>

Daly believes that "this is the fundamental wild fact that so far has not found expression in words sufficiently feral to assault successfully the civil stupor of economic discourse."

(As an aside, this might be contrasted with the recent remarks of Secretary Bentsen, who was telling U.S. investors last week in California about the need for foreign capital to build the infrastructure in the dynamic markets of the APEC countries; he described the demand for new roads as the equivalent of building a new Century City Freeway every week, a rather dangerous road to take, for environmental and other reasons.)

When we look at the big picture, we must inevitably conclude that we do not have a sustainable system of development. Our legal system for regulating the market is simply not designed to achieve sustainability, and it should come as no surprise that it is not achieving sustainability. This is true even in countries where we have the strongest environmental standards, including the United States.

Yet environmental standards implemented through transparent laws are the key to redirecting industry and the market towards sustainability (along with environmental education and a renewed sense of environmental ethics, for individuals, firms, and governments).

Environmental laws and regulations and the standards they impose are the tools for governing the market. Unless and until lawmakers throughout the world fundamentally redesign our environmental legal system for regulating the market, we will not ever achieve sustainability.

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<sup>1</sup>Herman Daly & John Cobb, FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE 2 (1989).

## Redesigning Law to Promote Competitive Sustainability

**Law and Ecology.** Economic activity both domestically and internationally must be redirected, through environmental legal standards, towards ecological sustainability. We must go back to the basics: the fundamental principles of ecology. As lawmakers you can change the rules of the market, by changing the way you design laws to regulate it. But you cannot change the rules of ecology. They must be the touchstone.

We must take a new look at environmental law through the prism of ecological principles, to make sure that law ultimately becomes consistent with ecology, starting with environmental law, but other fields of law as well, including corporate law, antitrust law, securities law, and of course trade law. Indeed, we need to develop "law and ecology" as a school of thought in the same way the University of Chicago economists developed "law and economics"; in fact, we need to develop law and ecology as the antidote to law and economics, to provide the true bedrock for environmental law and sustainability.

**Harnessing the Market.** Once we get back to the bedrock of ecology, we'll be able to identify dependable guideposts for sustainability. But to get us to sustainability, we'll also need an engine, and that engine may well be the market. Not alone, as education and a renewed sense of environmental ethics also will be essential, and not where environmental irreversibilities are involved, such as threats to human health and the extinction of species and loss of biodiversity.

To quote Paul Hawken, of the environmentally conscious Smith & Hawken company: "Business is the only mechanism on the planet today powerful enough to produce the changes necessary to reverse global environmental and social degradation." Hawken describes industrialization as the economy of degradation, but he adds that there is a nascent restorative economy that is as large as the entire world economy, if we chose to make it so. And we can, through a redesigned legal system for harnessing the market.

**Competitive Sustainability.** The principles of ecology provide the destination, the market provides one of the most powerful engines, and "competitive sustainability" provides the steering mechanism. "Competitive sustainability" is designed to promote environmental standards as an element of competition, using competitive forces to reward firms and countries at the higher end of the environmental spectrum. It is a mechanism for realizing sustainability through the upward harmonization of domestic and international environmental standards, using competitive forces to create a level playing field for commerce at consistently higher levels of environmental and social protections that reward the cleanest and most efficient economic actors for their efforts.

We saw elements of this mechanism at the international level in relation to NAFTA. Largely because of Congress's concern, the US demanded that Mexico improve its environmental law system. Many in US industry also saw this as advantageous, recognizing that US environmental laws would remain strong, and that they could gain a competitive

advantage by ensuring that Mexico also imposed comparable environmental standards. The US standards thus were the fulcrum and trade expansion the lever for improving Mexico's environmental standards.

We also see elements at the firm level, where one competitor encourages EPA and DOJ to enforce environmental laws against another competitor. This happens domestically; I saw it when I was at DOJ during the Carter years; once I'd make a case against one polluter, he or she would tell me exactly how their key competitors were doing the same thing, and help me develop the case. It also happens internationally; Sun Oil is currently encouraging US regulators to enforce environmental laws against their Venezuelan competitors in the oil business. (I've often wondered why we don't provide the same environmental enforcement options to firms harmed by competitors that fail to follow environmental standards as we provide for private antitrust enforcement, including treble damages.)

But these are the tip of the iceberg, in terms of potential. A deliberate effort to promote competitive sustainability by redesigning environmental law domestically and internationally could reap tremendous rewards, without any unbearable burden on industry (because the environmental playing field would continue to be leveled upward).

#### Specific Steps Toward Competitive Sustainability

**More Complete Cost Internalization.** A central tenant of competitive sustainability, recognized by both free traders and environmentalists, is the need to internalize environmental costs into product costs, through such mechanisms as taxes, fees, charges, permits, and command-and-control systems requiring, for example, a scrubber on a smoke stack.

Current environmental legal standards often do a poor job of cost internalization. Products produced under substandard environmental laws or laws that are not enforced are nevertheless freely traded on international markets at a competitive cost advantage over products from nations with strong environmental laws that are enforced, including in particular the United States.

Products produced without adequate environmental legal standards receive a subsidy by passing their environmental costs to the general public and downstream producers. This leaves the incentives working backwards, penalizing the good environmental actors and rewarding the bad.

Cost internalization might be facilitated through greater use of economic instruments, such as taxes and charges, which also can be more easily harmonized. An international framework convention for environmental cost internalization also may be needed.

**Countervailing Duties.** One way to eliminate the competitive disadvantage held by companies producing products in nations not enforcing strict environmental legal standards is to allow nations to apply a countervailing duty on these products equal to the environmental subsidy the products receive, when the products enter the importing nation's market.

Countervailing duties would go a long way towards leveling the environmental playing field for international trade, and would give the companies at the high end of the environmental spectrum the incentive to assist in the prosecution of such actions. While developing countries are generally against such actions, and there are dangers of protectionism, there are carrots that might be coupled with countervailing duties, including rebates, as provided in the earlier Boren bill (the International Pollution Deterrence Act of 1991). We also should consider redesigning the Generalized System of Preferences to give developing countries trade preferences for green or greener products.

Other funding and technical assistance could be provided to assist developing countries improve their environmental capabilities. This would seem like a very good investment of US bilateral assistance through AID and other US agencies and multilateral assistance through the GEF and the MDBs. I would suggest that any such assistance go not only to official government environmental institutions, but also to the NGO community.

**Measurement and Disclosure.** Even where we are not able to have all cost internalized through environmental standards, it would be very useful to begin identifying, quantifying, and disclosing such costs, to remind us just how far we have to go, and to learn the techniques we will need for more complete cost internalization.

Life cycle analysis offers considerable promise for measuring and quantifying environmental costs. But to reach its potential, trade law will have to be redesigned to allow production and process methods as legitimate environmental standards, and not merely environmental product standards. Sophisticated environmental labelling schemes also offer great promise, by allowing the greener producers to show their products in a better light vis a vis the products of their competitors. (Green Seal and Scientific Certification Systems are the two US labelling groups currently competing for the growing US labelling business.)

Another method to measure and disclose environmental costs is to redesign our system of national accounts, clearly an idea that should be pursued vigorously.

And then there is environmental law, which of course already internalizes some environmental costs — often crudely sometimes more elegantly — , and which should be carefully measured and made transparent. When the US began negotiating NAFTA, EPA had to acquire, translate, and analyze the state of Mexican environmental law. Only then could we see how far Mexico had to change to reach US environmental standards.

In this connection, and working with GLOBE USA, CIEL is embarking on a project to prepare country-by-country reports on the state of environmental law, with special emphasis on our key trading partners. But our effort is not sufficient, and Congress may well want to direct the EPA, AID, and Commerce to cooperate on an effort to monitor the state of environmental law, especially of our trading partners. (This information on the state of environmental law also would greatly assist our exporters, including the strong US environmental goods and services industry.)

I would like to make a final comment about information disclosure, deliberately provocative. We should consider that we spend over \$130 billion a year in the US alone on advertising<sup>2</sup>, to encourage consumers to consume more. We regulate advertising sparingly — alcohol and tobacco, and of course false and misleading claims. But creative regulation perhaps could be explored to give a preference to green products, or to discourage misleading claims of greenness. In a very real sense, much of our advertising may be misleading consumers about the environmental consequences of buying specific products.

(I'll quote another interesting statistic from Paul Hawken: kids today can identify 1,000 brand names, and virtually no flora or fauna. So much for the power of advertising.)

In sum, measurement, quantification, and disclosure provide a feedback loop to promote competitive sustainability, by providing critical information for regulators, consumers, and firms themselves.

**Vigorous Environmental Enforcement.** Strong environmental laws carefully measured and made transparent, is only the first step. And it will be for naught without strong enforcement. In this respect, Congress might consider how to make our federal court jurisdiction more hospitable to those who would assist in the enforcement of environmental laws. Facilitating cross-border plaintiffs also would be important, as in the Nordic Environmental Protection Convention.

**Expanded NGO Participation.** This should be obvious, but I will repeat it here. The role of NGOs must be expanded, as they so often have the incentive and the expertise to monitor and enforce environmental laws.

**Environmental Law Education.** Another strategy for competitive sustainability relates to the need to train and re-train environmental lawyers and regulators throughout the world. CIEL directs an international environmental law program at the American University, where we have 150 foreign lawyers every year from 50 to 60 countries studying for an advanced LLM law degree. Perhaps 30 concentrate on environmental law.

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<sup>2</sup>Ekins, The Sustainable Consumer Society: A Contradiction in Terms?, INTERNATIONAL ENVIRONMENTAL AFFAIRS 243 (1990).

Through this and other experience, it has become clear that there are not enough well trained lawyers outside of the US and perhaps western Europe, especially lawyers with a public interest spirit.

Yet if the US were to take the lead in training the next generation of environmental legislators and regulators throughout the world, as we have done with economists, and if we could teach the fundamentals of law and ecology, we would have a leading role in redesigning law throughout the globe to achieve ecological sustainability.

**Multilateral Mechanisms.** Much of what I have discussed focuses on domestic regulation of the market, in the US and in the jurisdictions of our trading partners. Much of trade law, of course, is multilateral, and it is worth considering other multilateral measures for international environmental protection, especially to guide the development of strong domestic environmental laws. In addition to implementation of the UNCED agreements, I would recommend an international APA. The US Administrative Procedures Act would make a terrific international model, both for our international institutions and for redesigned national legal systems. An international APA would greatly assist enforcement and NGO participation. (We could use it right now, as we draft the administrative rules for the new NAFTA institutions, and for the World Bank Inspection Panel.)

Finally, it may be worth considering a framework convention to guide environmental cost internalization, a principle honored largely in the breach, especially at the international level. Soft law guidelines would be one way to begin.

### Conclusion

We need to redesign our environmental legal standards until there are consistent with the basic principles of ecology, including the US legal system.

We must use trade law as the lever and the high US environmental standards as the fulcrum for raising the standards of the other nations of the world, as we have done with some success with NAFTA, with due regard for the need for technical assistance, technology transfer, and funding assistance in many cases.

But we cannot stop with trade law. We must use all available legal mechanisms to promote ecological sustainability, including bilateral and multilateral aid. We must redirect our incentives and disincentives in all fields of law, in order to promote ecologically sustainable development.

Nor can we stop with law, as education and a renewed sense of ethics must be part of the social change for guiding us to sustainability.

Finally, I am nervous to rely on corporations so heavily as the engine for change, and disappointed that the self interest that drives the market may be our strongest force. But with careful redesign of law, beginning with the efforts of the US, I believe that this is one of the paths we must take.

Thank you.



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### Trade and the Environment

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# ENVIRONMENTAL LAW



# MAKING TRADE AND ENVIRONMENTAL POLICIES MUTUALLY REINFORCING: FORGING COMPETITIVE SUSTAINABILITY

By  
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*The authors assert that environmental and international trade policies must become mutually reinforcing so that environmental policies do not distort trade flows and economic activities do not continue in an unsound and unsustainable manner. Competitive sustainability is the mechanism for achieving sustainable development by harmonizing domestic and international environmental standards through the use of competitive forces which reward the cleanest and most efficient economic actors. An international system of incentives and disincentives will create a mutually reinforcing mechanism for directing trade and environmental policies toward improving the worldwide standard of living.*

## I. INTRODUCTION

Former U.S. Ambassador to the General Agreement on Tariffs & Trade<sup>1</sup> Michael Smith astutely noted that the environment is the trade issue of the 1990s, and that, unless a considered solution is developed to allow constructive interaction between trade and the environment, each of these vital policy spheres may find themselves compromised.<sup>2</sup> Put in "Smithese," "[t]he question is

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1. An administrative body established to oversee the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Part 5, 55 U.N.T.S. 187 (GATT).

2. Mark Magnier, *Power of Environmentalists Called Trade Issue of '90s*, J.

whether you want to lay down in front of the train or get in the cab and steer it."<sup>3</sup> Steering is the preferable approach.

As the contributions to this issue demonstrate, the steering process for trade and environment policy indeed has begun. The dialogue is rapidly evolving from its early emphasis on potential conflicts between trade and environmental policies to a more positive attempt to minimize or eliminate frictions between these two policy spheres. Though this evolution is positive from both trade and environmental perspectives, it simply does not go far enough. We need to rethink the course we want to steer. True advancement of both ecological and economic imperatives will occur only when trade and environmental policies are mutually reinforcing.<sup>4</sup> "Competitive sustainability" defines a mechanism for realizing sustainable development through the "upward harmonization" of domestic and international environmental standards, using competitive forces to create a level playing field for commerce at consistently higher levels of environmental and social protections that reward the cleanest and most efficient economic actors for their efforts.<sup>5</sup> The goal here is not to overburden economic activities, but to put them to work for the environment. By focusing economic activities, through incentives and disincentives, in directions that yield both economic and environmental benefits, these economic activities can become engines to drive standards of living—broadly defined to include economic, environmental, social, and health stability and security—upwards.

#### A. *The Untenable Status Quo*

Environmental policies have long relied on trade sanctions to advance their goals,<sup>6</sup> and trade tribunals nearly a decade ago found environmental laws in conflict with trade rules.<sup>7</sup> Yet, it was

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Com., July 20, 1992, at 3A (paraphrasing Ambassador Smith).

3. *Id.* at 3A (quoting Ambassador Smith).

4. See Robert F. Housman & Durwood J. Zaelke, *Trade, Environment & Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535, 610 (1992).

5. See Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVT'L. L. 153 (1988).

6. See, e.g., Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-1980 (1988) (restricting the import of fishery or wildlife products from countries which violate international environmental programs).

7. See, e.g., *United States—Taxes on Petroleum and Certain Imported Sub-*

not until the *Tuna-Dolphin* decision<sup>8</sup> that trade and environmental policies were perceived as significant threats to each other.<sup>9</sup> Only in the wake of the *Tuna-Dolphin* panel's sweeping pronouncements did trade advocates come to fear environmentalists and vice versa. There has been no rush, however, to use environmental policies to disrupt the trading system or to use trade policies to undermine environmental protections. Thus, the current ecological and economic state of the world—the status quo—is a product of coexisting trade and environmental policies.

Yet, even a cursory glance at the Earth's "vital signs" shows that this status quo is simply not working.<sup>10</sup> Environmental degradation, driven principally by economic activities, is already occurring at a rate and scale that places both ecological and economic systems at risk.<sup>11</sup> Take, for example, the threat of global warming caused chiefly by carbon dioxide emissions.<sup>12</sup> Assuming the present growth rate in greenhouse gases remains constant, we may have already committed the planet to a mean global warming of three to eight degrees Fahrenheit (1.5°C to 4.5°C).<sup>13</sup> Global warming is expected to cause a mean sea-level rise of approxi-

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stances, GATT Doc. L/6175 (June 17, 1987) (the "Superfund" case).

8. Dispute Settlement Panel Report on United States Restrictions of Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594.

9. See, e.g., AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS FOR THE PREPARATION OF A PROTOCOL ON CHLOROFLUOROCARBONS TO THE VIENNA CONVENTION FOR THE PROTECTION OF THE OZONE LAYER (VIENNA GROUP), REPORT OF THE AD HOC WORKING GROUP ON THE WORK OF ITS THIRD SESSION, UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) at 17-18, U.N. Doc. WG.172 (1987) (GATT Secretariat legal expert's opinion to the Montreal Protocol negotiators that the trade provisions of the Protocol were consistent with the GATT) [hereinafter GATT Report]; *Unfair Trade Practices: Hearings Before the Subcommittee on Oversight and Investigation of the House of Representatives Committee on Energy and Commerce*, 101st Cong., 2d Sess. 179 (1990) (The Marine Mammal Protection Act is consistent with GATT).

10. See LESTER R. BROWN ET AL., VITAL SIGNS 1992, at 15-19 (1992).

11. HERMAN DALY & JOHN COBB, FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT AND A SUSTAINABLE FUTURE 2 (1989).

12. See U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, CHANGING BY DEGREES: STEPS TO REDUCE GREENHOUSE GASES 53-58 (1991). Climate models suggest that a 30% increase in carbon dioxide projected for the period between 1985 and 2030 will add 0.45°C to 1.3°C to expected global temperatures. *Id.* at 57.

13. *Id.* at 58; Dean Edwin Abrahamson, *Global Warming: The Issue, Impacts, Responses*, in THE CHALLENGE OF GLOBAL WARMING 10 (Dean Edwin Abrahamson ed., 1989).

mately twenty-eight to ninety-eight centimeters by 2090.<sup>14</sup> A rise of only twenty-five centimeters would render countless island-states uninhabitable, as well as the delta regions of the Nile, the Ganges and the Yangtze rivers, displacing millions of people.<sup>15</sup> Given these and other consequences, the potential economic and social effects of global warming are substantial.

Global warming is just one of the many threats that jeopardize the long-term prosperity of both our ecological and economic systems. Ozone depletion will also place major burdens on these systems. Scientists have recently detected record high levels of ozone-depleting chlorine monoxide over New England and Canada.<sup>16</sup> These record levels are troubling when one considers that epidemiologists estimate that each one percent loss of stratospheric ozone leads to an increased incidence of skin cancer of three percent or more.<sup>17</sup> The human and economic costs of increasing cancer rates by even three percent are substantial, to say the least.

The deliberate overutilization of natural resources is compromising global economic and ecological security<sup>18</sup> by threatening biodiversity and depleting the world's economic capital reserves.

The result is that our standard of living is falling. Environmental harms, such as air and water pollution, are causing greater numbers of people to become afflicted with illnesses such as respiratory disease and cancer.<sup>19</sup> Meanwhile, the overexploitation of resources jeopardizes our ability to feed the world's current popu-

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14. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: THE IPCC IMPACTS ASSESSMENT, at 5-1 to 5-2 (1990).

15. *Id.*

16. See Kathy Sawyer, *Ozone-Hole Conditions Spreading; High Concentrations of Key Pollutants Discovered over the U.S.*, WASH. POST, Feb. 4, 1992, at A1.

17. BROWN ET AL., *supra* note 10, at 62 (citing UNEP, ENVIRONMENTAL EFFECTS OF OZONE DEPLETION: 1991 UPDATE (1991)).

18. For example, the overexploitation of fisheries already threatens a number of commercially significant species, including Atlantic Cod, Haddock, Atlantic Herring, Capelin, Southern African Pilchard, Pacific Ocean Perch, King Crab, and Peruvian Anchoveta. *Id.* at 30 (citing UNEP, ENVIRONMENTAL DATA REPORT 1991-92 (1991)).

19. See ENVIRONMENTAL EXCHANGE, AIR POLLUTION SOLUTIONS 6 (1992) (EPA estimates provide that roughly 140,000 Americans alive today will get cancer from toxic industrial air emissions).

lation at a time when that population is steadily increasing.<sup>20</sup> Simply put, everything that should be increasing is decreasing and everything that should be decreasing is increasing. Economic activities are intended to make our lives better, yet in their current form they are making our lives worse.

It follows that we have to rethink the direction of economic activity. The global economy must be directed toward activities that not only reap economic benefits but, at a minimum, do not degrade the environment, and preferably work in some way to ameliorate past environmental trespasses. Paul Hawken, the founder of the environmentally conscious Smith & Hawken company, summarized this need in the following manner: "Business is the only mechanism on the planet today powerful enough to produce the changes necessary to reverse global environmental and social degradation."<sup>21</sup> In rethinking the course of economic activity, Hawken goes on to state that "[t]here is an economy of degradation, which is one objective way to describe industrialization, and there is a restorative economy that is nascent but real, whose potential size is as great as the entire world economy is today."<sup>22</sup> The question remains: How can the global economy be encouraged to follow a restorative path? One of the principal mechanisms for encouraging this conversion is the international trade system.

### B. Where Trade Fits into Competitive Sustainability

With the mass globalization of economic activity now occurring,<sup>23</sup> economic activity is rapidly becoming synonymous with international trade.<sup>24</sup> In the United States, for example, from 1988 to 1991, gross domestic product (GDP) increased \$129.8 billion in constant dollars.<sup>25</sup> Exports of products alone accounted for seventy percent of that growth.<sup>26</sup> Moreover, at least one group of ex-

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20. See WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 48-56 (1977).

21. Paul Hawken, *The Ecology of Commerce*, INC., Apr. 1992, at 93, 94.

22. *Id.*

23. See Derek Leebaert, *Innovations and Private Initiatives as Frontiers Fall*, 15 WASH. Q. 107, 113-19 (1992).

24. *See id.*

25. See Ed Rubenstein, *The Be GATTs*, NAT'L REV. Apr. 27, 1992, at 14.

26. *Id.*

perts, the Council of Economic Advisors, estimates that if the current Uruguay Round of the GATT can be successfully completed, the United States will add \$1.1 trillion (in constant 1989 dollars) to GDP over the next ten years.<sup>27</sup>

The numbers are equally impressive at the international level. Although growth has been sluggish over the past three years, in 1991 the volume of world trade in merchandise reached a new peak of \$3.53 trillion.<sup>28</sup> The services sector contributed an additional \$850 billion to world trade volume—a figure that even GATT cautions is likely to be an underestimate.<sup>29</sup>

If one follows the Ricardo and Smith schools of thought,<sup>30</sup> free trade allows each country to do that which it does best at a "comparative advantage."<sup>31</sup> The efficiency and comparative advantage of individual countries, acting through free trade, result in a magnified efficiency of the global economy.<sup>32</sup> In addition, trade rules, like the U.S. Internal Revenue Code, provide incentives for certain activities and disincentives for others, directing, to a degree, what activities will be undertaken.<sup>33</sup> In a perfect system, trade provides incentives for, and magnifies the effects of, economic activities that benefit larger numbers of people around the world.<sup>34</sup> But if, as is now occurring, economic activities decrease human well-being, trade actually makes economic activity more efficient at diminishing the overall standard of living.<sup>35</sup>

If free trade is a mechanism to advance other goals—as opposed to a goal unto itself—the current condition that allows trade to lower standards of living is unacceptable. This is not to

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27. *Id.*

28. Frances Williams, *GATT Disquiet at Slower Trade Growth*, *FIN. TIMES*, Mar. 18, 1992, at 18.

29. *See id.*

30. *See generally* DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (London, J. Murray 1817); ADAM SMITH, *THE WEALTH OF NATIONS* (London, J.M. Dent & Sons 1966).

31. *See generally* JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 10-14 (1989).

32. *See generally* *Trade and Environment: Factual Note by the Secretariat*, GATT Doc. L/6896 (Sept. 18, 1991).

33. *See JACKSON, supra* note 31, at 83.

34. *See generally id.*

35. *See Herman E. Daly, From Adjustment to Sustainable Development: The Obstacle of Free Trade*, address at Loyola Law School (Feb. 29, 1992).

say that trade is the "great destroyer,"<sup>36</sup> but that the incentives trade currently provides to economic activities are misplaced. The key is to alter trade incentives to encourage economic activities that provide increasing levels of economic and ecological well-being. Redirecting these incentives so that trade and environmental policies are mutually reinforcing will rejuvenate economic and social bases, encourage increased efficiency in economic systems, and provide additional support for each nation's comparative advantage.

Competitive sustainability provides a theoretical framework for thinking about mutually reinforcing economic and ecological systems. One of the principle goals of competitive sustainability is a concurrent increase in domestic and international environmental standards. The theory further provides that the best mechanism for encouraging this upward harmonization is the use of competitive forces to create a level playing field for commerce at consistently higher levels of environmental and social protections through a set of incentives that reward the cleanest and most efficient economic actors for their efforts.<sup>37</sup>

These incentives must, however, be coupled with the more traditional command-and-control type baseline standards. These baseline standards function as an environmental safety net to ensure that market failures do not allow serious environmental or human health threats to occur. They also ensure that all competitors in a given market begin internalizing the environmental and health costs of their production activities.

## II. PUTTING THEORY INTO PRACTICE

### A. Environmental Countervailing Duties

One of the central tenets of competitive sustainability, recog-

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36. But see David Morris, *Free Trade: the Great Destroyer*, 20 THE ECOLOGIST 190 (1990).

37. On the domestic level a similar approach to environmental regulation has been advanced by those who advocate a market-based approach to environmental protection. See Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVT'L. L. 153 (1988); Joel A. Mintz, *Economic Reform of Environmental Protection: A Brief Comment on a Recent Debate*, 15 HARV. ENVT'L. L. REV. 149 (1991); FREDERICK A. ANDERSON ET AL., *ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES* (1977).

nized both by free traders and environmentalists,<sup>38</sup> is that environmental costs must be internalized into product costs.<sup>39</sup> The environmental costs of production wreaked upon society, such as poisoned water and air, traditionally have not been borne by products, but must now be included in the cost of these products at market. There are several ways that this can be accomplished in domestic markets. Production permits can be required and fees paid for the privilege of polluting.<sup>40</sup> These permit fees would be added to the costs of production and make environmental costs into real costs. Similarly, command-and-control requirements, such as installing a scrubber, also internalize environmental costs to a degree. Internationally, neither the economic nor ecological systems have developed to the extent necessary to establish a multinational permit scheme or regulatory framework, although such a system has been discussed in the context of efforts to combat global warming.<sup>41</sup>

Since there is no mechanism for complete environmental cost internalization, products produced under substandard environmental laws or weak enforcement regimes are traded freely on international markets at a competitive cost advantage over products from nations with strong environmental laws.<sup>42</sup> In essence,

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38. See *id.*; OECD, *The Polluter Pays Principle: Definition, Analysis, Implementation*, (discussing guiding principles concerning international economic aspects of environmental policies) May 26, 1972, C(72)128 (1975); Frank Ackerman, *Waste Management: Taxing the Trash Away*, ENVIRONMENT, June 1992, at 2; Ursula Kettlewell, *The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter Pays Principle*, 3 COLO. J. INT'L ENVT'L POL'Y 429 (1992).

39. Housman & Zaelke, *supra* note 4, at 605-06.

40. See, e.g., Clean Air Act Amendments of 1990, 42 U.S.C. §7651(b) (Supp. 1991) (electrical utilities pollution allowances); see generally Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 ENVT'L L. 2021 (1991).

41. See, e.g., Donald M. Goldberg, *Reducing Greenhouse Gas Emissions: A Combined Strategy Using Permits, Fees and Country Commitments* 2 (Feb. 1992) (on file with Center for International Environmental Law).

42. See generally Thomas K. Plofchan, Jr., *Recognizing and Countervailing Environmental Subsidies*, 26 INT'L L. 763 (1992) (discussing ways in which international trade law may be used to effect greater worldwide environmental protection); RESEARCH AND POLICY COMMITTEE, COMMITTEE FOR ECON. DEV., *BREAKING NEW GROUND IN U.S. TRADE POLICY* 73 (1991). While, if properly crafted, the vast majority of environmental laws can improve manufacturing efficiency and yield a competitive advantage, even the most efficient corporations cannot compete with competitors who receive the basic raw materials for production at no cost. In essence, the lack of environmental regulation amounts to free air, water, and land to

products produced without environmental protection requirements receive a subsidy by passing the costs of their environmental harms downstream.<sup>43</sup> These costs are then borne by the general public (who pay both environmentally, through air they can't breath; and economically, through rising health care costs) and by downstream producers (who find that their activities are compromised by the environmental costs passed on by upstream activities).<sup>44</sup> In sum, the current incentives are backwards.

Perhaps the simplest way to eliminate the competitive advantage held by companies producing products in nations not enforcing environmental laws is to allow nations to apply a countervailing duty on these products equal to the environmental subsidy the products receive when they enter the importing nation's market.<sup>45</sup> Applying environmental countervailing duties would have a number of positive effects. First, it would level the competitive playing field upward by removing the incentive to pollute. Second, by removing the competitive incentive given by lower environmental standards, these duties would encourage exporting countries to adopt and enforce environmental laws at home. Third, allowing economically harmed companies to com-

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despoil while competitors pay for these goods. Thus, while environmental laws can help a company "use" less air and often become more efficient, they cannot reduce the costs of using natural resources below zero—the cost of free resources in countries without acceptable environmental laws. Moreover, opponents of this theory argue that there is no competitive advantage from the lack of environmental laws because, in most cases, the costs of compliance are less than two percent. This view fails to take into account at least two critical factors. First and foremost, it fails to mention that the costs of compliance can be much higher for industries that cause the greatest environmental harms. Further, while two percent seems like a very low number, if that percentage is taken from the total cost of a product that has a high cost or is taken from the total cost of buying large numbers of low cost products, even a two percent difference can amount to a substantial cost difference.

43. See Kenneth S. Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT*, 10 Hous. J. INT'L L. 189, 209 (1988); see also Plofchan, *supra* note 42, at 780.

44. For example, an upstream plant that dumps toxics into the water poisons the fish which downstream fishermen rely upon for their livelihood. Thus, the environmental costs of the dumping are borne by the fishermen and not the factory; the fishermen are subsidizing the factory. On a global level, ozone depletion will at some point compromise the resort industries of many countries. As upstream producers deplete the ozone, people will no longer be able to safely go to certain beaches, and resorts at these beaches will lose clientele.

45. See Plofchan, *supra* note 42, at 780.

plain of environmentally unsound practices abroad would put the substantial resources of private economic actors behind the international policing of environmental laws. Moreover, environmental countervailing duty cases would provide a public forum that could focus public scorn on companies and nations acting without concern for the health and safety of people and the planet.

Opponents of the use of environmental countervailing duties argue that such a system would: 1) prove unadministrable; 2) be a breeding ground for protectionism; 3) harm developing countries; and 4) allow one nation to impose its values on other nations. While these are all valid concerns, a properly structured countervailing duty system could address them.<sup>16</sup>

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46. Apart from whether environmental countervailing duties are a proper policy choice, it is possible that many of these subsidies could already be recognized as subsidies and countervailed under existing laws. Subsidies exist in two forms: export subsidies and domestic subsidies. Export subsidies are defined as government programs or practices that “[increase] the profitability of export sales but [do] not similarly increase the profitability of sales for domestic consumption”. *Id.* at 766 (quoting Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 203-04 (1989)). Domestic subsidies are defined as “governmental programs that are sufficiently targeted ‘to a specific enterprise or industry, or group of enterprises or industries,’ and that provide an advantage to the producers not found in the marketplace.” *Id.* (quoting 19 U.S.C. § 1677(5)(B) (1988)). Environmental subsidies do not typically provide a benefit targeted only to exports, and so they are generally not export subsidies. However, environmental subsidies typically do provide a producer with an advantage in the marketplace and could conceivably be characterized as “domestic subsidies.” *See id.* at 770-71. Moreover, at least one commentator believes that environmental subsidies meet the test for a domestic subsidy set out under U.S. law. *Id.* at 771 (citing 19 U.S.C. § 1677(5)(A)(ii)(IV) (1988)).

If any difficulty arises in defining environmental subsidies, that difficulty is whether these subsidies are countervailable. *See id.* at 772. Countervailability requires three elements. The subsidy must: 1) be targeted to a specific industry or group of industries; 2) inflict a material injury to the importing country’s domestic industries; and 3) be capable of being valued. *Id.* at 771. If one defines a group of industries by its relative means of production and disposal (e.g., all industries that use chlorinated fluorocarbons or dispose of their wastes into waters), then it is clear that environmental subsidies provide a targeted benefit to a discernible group or class of companies. *See id.* at 771. As to the second prong, material injury, U.S. law requires that, in order to find a material injury, a causal link must exist between the subsidy provided to the imports in question and a negative or threatened trend in the domestic industry. *Id.* at 771-74. This test requires a case-by-case analysis that does not permit generalization as to when environmental subsidies are countervailable under existing law. The third test for countervailability is valuation. *See id.* at 771. While environmental subsidies may not be easy

### 1. Administrability

Opponents of using environmental countervailing duties argue that the failure to impose environmental laws is not a sufficiently targeted benefit to a particular industry or group of industries to constitute a "subsidy." Rather, lower environmental standards are more like generalized societal benefits such as roads or educational systems.<sup>47</sup> This argument fails to recognize that the international trading system is coming to recognize that certain governmental policies, like the failure to enforce intellectual property protections, provide a benefit—a subsidy—to a class of industries that can be defined by their means of production.<sup>48</sup> The same can be said of the failure to enforce environmental laws, that is, the discernable class can be defined from such processes as their disposal of wastes into water.<sup>49</sup>

Opponents of environmental countervailing duties also argue that, given the vast range of approaches to environmental protection from command-and-control regulations to market-based strategies, it would be difficult to determine when two countries' different approaches applied to the same environmental problem are equivalent. Similarly, they argue that even if equivalence in standards can be determined, it would be difficult to calculate the degree of advantage gained through a lower standard for the purposes of setting the amount of duty to impose.<sup>50</sup>

Each of these two administrative difficulties can be overcome by returning to the purposes of environmental countervailing duties. Environmental countervailing duties serve two purposes: (1) to internalize otherwise externalized costs, leveling the playing fields for trade; and (2) to encourage environmental protection. Based on these goals, differences in standards and the amount of

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to value, similar valuation problems have been overcome with regard to other forms of subsidies such as the failure to enforce antitrust laws.

47. See GATT Report *supra* note 9, at 20.

48. See, e.g., *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991), [hereinafter Dunkel Draft] (trade related aspects of intellectual property); North American Free Trade Agreement (NAFTA), Sept. 6, 1992, ch. 15 (competition policy and monopolies), ch. 17 (intellectual property) available in Westlaw, NAFTA database.

49. See Plofchan, *supra* note 42, at 771.

50. See *id.* at 774-75.

duties could be determined from the per-product unit cost of environmental compliance between similar, or "like," imported and domestic goods.<sup>51</sup> Where an importing nation believes that the different costs of compliance reflect differences not in the level of protection but rather in the efficiency of the regulatory approach, that country should be allowed to show that their regulatory approach achieves an equivalent level of environmental, health, and safety protection. This showing would prevent the imposition of a countervailing duty and encourage the other party to adopt the more efficient regulatory approach. Existing scientific technologies have the capability of providing the information necessary to make these determinations.

Moreover, a properly constructed system of environmental countervailing duties would look at all the environmental regulations concerning a whole production system. Thus, if the environmental laws imposed on a production facility in one country are more stringent with regard to water disposal, perhaps because the country lacks water resources, this could offset slightly lower air standards. This offset program would prevent disputes from arising over minor differences in standards. It would also allow for disputes to arise where a country's standards are not substantially lower in one area, but are slightly lower in all or many areas, with the net effect of creating a competitive advantage. This multi-media approach to environmental countervailing duties accords with the general direction all environmental regulation must follow.<sup>52</sup>

## 2. Protectionism

As with any type of government regulation over markets, if improperly used, environmental countervailing duties could become a tool for protectionist interests.<sup>53</sup> However, the potential for abuse is a weak ground for dismissing the use of such duties in an environmental context, especially when one sees the wide ar-

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51. See *id.*

52. Accord Robert A. Frosch & Nicholas E. Galloopoulos, *Strategies for Manufacturing*, Sci. Am., Sept. 1989, at 144, 152 (discussing industrial ecology principles).

53. See Patrick Low & Raed Safadi, *Trade Policy and Pollution*, in *INTERNATIONAL TRADE AND THE ENVIRONMENT* (Patrick Low ed., 1992) (2 World Bank Discussion Papers 29, 39); GATT Report *supra* note 9, at 5.

ray of other interests protected by similar trade sanction schemes at the risk of protectionism.<sup>54</sup> Rather, the risk of protectionism is one reason to ensure that the system under which such duties are applied is set up in such a way as to prevent their misuse.

The creation of a "reverse 301" process<sup>55</sup> is one example of how to achieve the benefits of environmental countervailing duties while minimizing the threats of protectionism.<sup>56</sup> Under section 301 of the Trade Act of 1974, as amended, private parties may petition the U.S. Trade Representative (USTR) to initiate an investigation of a practice or policy of a foreign government that violates a trade agreement, is inconsistent with the international rights of the United States, or is otherwise contrary to the provisions of section 301.<sup>57</sup> If the USTR determines that the foreign practice violates one of these obligations, she must impose retaliatory measures, such as duties, unless the violation falls within certain exceptions.<sup>58</sup> Section 301 also provides for discre-

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54. See, e.g., 19 U.S.C. § 1337 (Supp. 1990) (trade sanctions for patent infringement). In fact, a whole host of widely divergent interests have been advanced through U.S. trade sanctions. See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162 (1987).

55. Section 301 of the Trade Act of 1974, *infra* note 57, was designed to encourage other nations to open their markets; the vast majority of § 301 cases involve foreign practices that impede U.S. exports. Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 302 (1990). Thus, legislation designed to prevent unfair imports, which § 301 also provides for, would be a "reverse 301."

56. See *id.*; Richard Diamond, *Changes in the Game: Understanding the Relationship Between Section 301 and U.S. Trade Strategies*, 8 B.U. INT'L L.J. 351, 360-61 (1990) (Professor Diamond notes that, as amended, § 301's short time frames for negotiation could increase the credibility of threats by mandating retaliation at the end of the time frames if agreement is not reached). But see Fusae Nara, Note, *A Shift Toward Protectionism Under § 301 of the 1974 Trade Act: Problems of Unilateral Trade Retaliation Under International Law*, 19 HOFSTRA L. REV. 229 (1990).

57. Trade Act of 1974, §§ 301-302, 19 U.S.C. §§ 2411-2412 (1988). Cases may also commence at the USTR's initiation. *Id.* § 2412(a)-(b). While many in the international community have sharply opposed § 301's provisions, it is important to note that developments in the Uruguay Round seem to be leading towards an international acceptance of § 301-type provisions. See Judith Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301*, INT'L LAW., Fall 1992, at 799-800; see also JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 71 (1990) (discussing opposition to § 301).

58. Sykes, *supra* note 55, at 303-05; Judith H. Bello & Alan F. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*,

tionary retaliation where the USTR finds that a foreign practice is unreasonable or discriminatory and burdens or restricts U.S. commerce.<sup>60</sup> Despite section 301's draconian appearance the USTR retains a great deal of discretion in both mandatory and discretionary cases in setting the retaliatory measure.<sup>61</sup> One of the principal ways the USTR handles a section 301 case is to negotiate with the foreign party to eliminate the offending practice.<sup>62</sup> The delegation of negotiation and retaliatory authority to the USTR provides a buffer to minimize the protectionist use of the section's provisions.<sup>63</sup> Because of its structure, section 301 has proven an effective device to encourage other nations to enter into consultations directed at eliminating unfair trade practices.<sup>64</sup>

Under a reverse-301 environmental provision, a foreign party exporting products to the United States, who failed to provide baseline environmental protections concerning the production processes of these products, could be threatened with countervailing duties. These countervailing duties would be used to encourage the foreign party to enact and enforce comparable environmental laws.

### 3. Developing Country Concerns

Opponents of environmental countervailing duties also argue that developing countries cannot afford to meet the environmental laws of the developed world, and thus, the imposition of countervailing duties against their products would freeze them out of world markets.<sup>65</sup> Opponents further argue that environmental protection in the developing world will only come through growth. Therefore, blocking these countries from world markets will stymie the global expansion of environmental protection.<sup>66</sup> One scholar went so far as to argue that environmental laws should be "appropriate" not for some environmental protection goal, but for

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22 INT'L LAW, 1197, 1198 (1988).

59. 19 U.S.C. § 2411(b).

60. *Id.* § 2411(a)(1)(B)(ii), (b)(2), (c).

61. See *id.* § 2411(c)(1)(C); Sykes, *supra* note 55, at 304.

62. See Sykes, *supra* note 55, at 311.

63. Diamond, *supra* note 56, at 360-61.

64. See Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns*, in INTERNATIONAL TRADE AND THE ENVIRONMENT, *supra* note 53, at 325, 326.

65. See generally GATT Report, *supra* note 9, at 17-19.

a country's level of development.<sup>66</sup>

There are ample grounds for concern that developing countries who lack the means to comply with the environmental standards of the developed world would be frozen out of international markets if a system of environmental countervailing duties is created.<sup>67</sup> However, the costs of unsustainable growth, in both developing and developed countries, are higher than profits from the growth.<sup>68</sup> Thus, developing countries must be encouraged to undertake sustainable growth from the outset. A system of environmental countervailing duties can provide developing countries with the funds necessary to enhance environmental protection, while eliminating the incentives for unsustainable growth.

One method of balancing the concerns of developing countries with the need to enhance environmental protection is to return a substantial portion, if not all, of the revenues generated by environmental countervailing duties to the developing country of origin. A bill for exactly this type of scheme was proposed by Senator Boren.<sup>69</sup> If enacted, the International Pollution Deterrence Act of 1991 would have amended the countervailing duty laws of the United States to establish that the failure to enact and enforce environmental laws is a subsidy for the purposes of imposing countervailing duties. The bill further provided that fifty percent of the revenues generated through the application of its provisions would be allocated to a fund that would be distributed by the Agency for International Development to assist developing countries in purchasing environmentally sound technologies.<sup>70</sup>

#### 4. *Imposing Values Abroad*

Another argument against the use of countervailing duties in an environmental context is that the use of such duties is an infringement of the sovereign right of each nation to determine acceptable practices within their borders. Put into moral terms, the

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66. Gene Grossman, *In Poor Regions Environmental Laws Should Be Appropriate*, N.Y. TIMES, Mar. 1, 1992, at C11.

67. See Sorsa, *supra* note 64.

68. See DALY & COBB, *supra* note 11.

69. S. 984, 102d Cong., 1st Sess. (1991).

70. *Id.* § 4(d). The other 50% of the revenues generated would go to a fund administered by U.S. EPA to assist companies in developing new technologies. *Id.* § 4(c).

use of countervailing duties imposes the values of one nation upon the rest of the world, which may see things in a different light.<sup>71</sup> This argument also suffers from a number of flaws. First, countervailing duties have nothing to do with what other countries choose to allow within their own borders; it has everything to do with what the importing nation chooses to allow within its own borders. Countervailing duties do not require a foreign government to change its laws; they simply internalize the costs externalized by these laws—all within the borders of the importing nation. Moreover, even with such duties in place, the foreign product can still be sold at its subsidized price within the country-of-origin's markets.

Opponents respond that assessing countervailing duties still amounts to an imposition of values because the end result is that the exporting country can either forego trade opportunities or change its practices at home. This is absolutely true and entirely proper. For example, nations that enslave their people or use prison labor are often told to choose between ending these practices or foregoing trade opportunities.<sup>72</sup> There is no reason that environmental trespasses can not be similarly addressed. Assuming the validity of the "effects test,"<sup>73</sup> and given that environmental harms like ozone depletion and global warming directly endanger people around the world, there is an even stronger rationale for using trade sanctions to encourage environmentally sound behaviors. Further, since the failure of foreign countries to enforce environmental laws places U.S. competitors at a competitive disadvantage, the effects test would also allow a country to impose countervailing duties to counteract this improper advantage.<sup>74</sup> Some believe that many environmental threats are purely local in nature and that the use of countervailing duties and other trade measures to address such localized threats is inappropriate

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71. See Craig Obey, Comment, *Trade Incentives and Environmental Reform: The Search for a Suitable Incentive*, 4 GEO. INT'L ENVTL. L. REV. 421, 434-437 (1992); GATT Report *supra* note 9, at 20, 24-25.

72. See Carter, *supra* note 54 (discussing the use of trade sanctions).

73. The effects test provides that a state has jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territories. *Restatement (Third) of Foreign Relations Law of the United States* § 402(1)(c) (1986).

74. Cf. *United States v. ALCOA*, 148 F.2d 416 (2d Cir. 1945) (economic effects in the United States of anticompetitive behaviors taking place abroad gave U.S. jurisdiction to regulate the conduct in question).

in any case. This argument fails because environmental threats are global, cumulative, and persistent.<sup>75</sup>

### 5. *Changing the Incentives*

Under the current rules of international trade, it would be a violation of the GATT, in most circumstances, for a country to impose environmental countervailing duties upon imported products made in countries with substandard environmental protections.<sup>76</sup> These rules should be changed to provide a framework that allows countries to agree to impose such duties. Absent such a change, the United States should enact environmental countervailing duty provisions that provide for unilateral sanctions in order to force the evolution of the GATT.<sup>77</sup>

#### B. *The Carrot and the Stick*

The goal of competitive sustainability would be significantly advanced by adopting a system of countervailing duties to force environmentally lax countries to internalize their costs of production. However this "stick" should have a corresponding "carrot," or trade incentive program.<sup>78</sup> An environmental trade incentive program would encourage countries, particularly developing countries, to adopt more environmentally sound practices. The financial benefits of these inducements would help developing countries pay the costs of becoming more environmentally aware.<sup>79</sup> An

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75. See GEORGE HEATON ET AL., *TRANSFORMING TECHNOLOGY: AN AGENDA FOR ENVIRONMENTALLY SUSTAINABLE GROWTH IN THE 21ST CENTURY* 6 (1991) ("[P]ollution has come to be recognized as a global and chronic phenomenon. This means not only that pollution can be found everywhere but also that its impacts are now large enough to alter the fundamental natural processes that support life.").

76. See GATT Report *supra* note 9, at 17.

77. See Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 113 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (discussing "justified disobedience" as allowing for violations of GATT in order to force its evolution).

78. See Obey, *supra* note 71, at 443.

79. See *id.* In 1980, it was estimated that developing countries would need to spend approximately \$14 billion on pollution control in order to meet U.S. standards. See Steven Shrybman, *International Trade: In Search of an Environmental Conscience*, EPA J., Jul.-Aug. 1990, at 18.

incentive program would alleviate the need to resort to trade sanctions in many cases, thereby minimizing disruptions to the international trading system.

This carrot-and-stick approach is proving effective in combatting ozone depletion. The Montreal Protocol<sup>80</sup> adopts a system of trade sanctions against trade in ozone depleting chemicals,<sup>81</sup> in conjunction with trade and other economic benefits,<sup>82</sup> to encourage countries to join the Protocol and abide by its provisions.<sup>83</sup> Due at least in part due to these trade sticks and financial carrots, the Protocol is one of the most effective international environmental agreements. Other trade and economic incentives can be used to encourage the development of environmental protections in other nations.<sup>84</sup> For example, short-term direct financial assistance can be provided to developing nations to offset the added costs of complying with higher environmental standards.<sup>85</sup>

A second trade-driven approach would draw upon the Generalized System of Preferences, which provides listed developing countries with preferential trade treatment, and would grant developing countries trade offsets to make up for the burdens of higher levels of environmental protection needed to meet environmental and trade requirements in developed world markets.<sup>86</sup> A third, necessary mechanism for offsetting trade burdens would be to provide developing countries with increased access to developed world technologies.<sup>87</sup> The availability of such technologies is

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80. See Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY Doc. No. 10, 100th Cong., 1st Sess., 26 I.L.M. 1541 (1987).

81. *Id.* art. 4(2)-(3), 26 I.L.M. at 1554.

82. *Id.* art. 5, 26 I.L.M. at 1555-56.

83. See generally Dale S. Bryk, *The Montreal Protocol and Recent Developments to Protect the Ozone Layer*, 15 HARV. ENVT'L L. REV. 275, 283-97 (1991).

84. See John Ntambirweki, *The Developing Countries in the Evolution of International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 911-17 (1991).

85. Following the *Tuna-Dolphin* issue, the United States offered to offset Mexico's costs for increased dolphin protection. See *Sell the Whale*, ECONOMIST, June 27, 1992, at 16.

86. *Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Nov. 28, 1979); see also JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1149 (2d ed. 1986).

87. See Ntambirweki, *supra* note 84, at 917-20.

essential to empower these nations and their industries to become more ecologically sustainable trading partners. The need for technology transfer has been acknowledged in a wide array of international instruments and fora.<sup>88</sup> In addition to access to developed world technologies, developing countries also need access to developed world expertise if they are to be expected to become more environmentally sound trading partners.<sup>89</sup> Here again, a number of international agreements include provisions for technical cooperation.<sup>90</sup>

### C. Widening the Scope of Allowable Standards: Cradle to Grave

For the vast majority of products, the greatest environmental costs occur not at the consumer stage, but at the production and post-consumer stages. Under existing international trade law, a party is prohibited from enacting standards relating to the production process method by which an imported product is made.<sup>91</sup> This limitation renders any attempt by a country to use trade measures to encourage companies to adopt more sustainable production and disposal processes inconsistent with GATT. Removing the entire production and disposal cycles from the concept of

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88. See, e.g., G.A. Res. 3281, 29 U.N. GAOR, Supp. No. 31, at 51, U.N. Doc. A/9631 (1974), reprinted in 14 I.L.M. 251 (1975); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (*opened for signature*) Mar. 22, 1989, art. 10, para. 2(d), S. TREATY Doc. No. 5, 102d Cong., 1st Sess., 28 I.L.M. 649 (1984) (4 U.N. Doc. UNEP/IG. 80/3); Vienna Convention for the Protection of the Ozone Layer, May 22, 1985, art. 4, para. 2, S. TREATY Doc. No. 9, 99th Cong., 1st Sess., 26 I.L.M. 1516 (1987).

89. See Ntambirweki, *supra* note 84, at 917-20.

90. See *id.*

91. See generally *United States—Restrictions on Imports of Tuna*, 41, GATT Doc. DS21/R (Sept. 3, 1991) [hereinafter *Tuna-Dolphin Report*]; Housman & Zaelke, *supra* note 4, at 540-41; Frederick L. Kirgis, Jr., *Effective Pollution Control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 860, 893-901 (1972). Under GATT Article III, a party can establish point of importation requirements that affect the product. *Text of the General Agreement*, in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (Vol. IV, 1969) (General Agreement as in force Mar. 1, 1969). Production process standards that do not affect the physical or chemical makeup of the product cannot qualify for this allowance. *Id.* Further, GATT's Article XX exceptions only allow for measures that apply within the jurisdiction of the enacting party, production process standards cannot qualify under the GATT exceptions. See *infra* notes 92-94.

production deals a serious blow to advancing competitive sustainability. In order to encourage cleaner growth and require environmental cost internalization, countries must be allowed to ensure that the full life cycle of imported products—from cradle to grave—meets the standards applicable to similar domestic goods. Thus, the term “product,” as used in GATT Article III jurisprudence, must be augmented to include the production and disposal cycles of the product as it appears at market.

#### D. Judging Environmental Standards

Environmental countervailing duties are the sword for enacting competitive sustainability. However, shielding environmental standards that are challenged as unnecessary trade barriers is equally important. Environmental standards will continue to place restrictions on imported products and at times these restrictions will raise trade concerns. The issue then becomes how these environmental standards are to be judged, and by whom.

##### 1. The Standard of Review

Under the current rules of international trade, an environmental, health, or safety standard can run afoul of GATT's general obligations if the standard, *inter alia*: (1) applies differently to foreign and domestic products,<sup>92</sup> (2) applies differently to foreign products based upon their country-of-origin,<sup>93</sup> or (3) sets a quantitative restriction on trade.<sup>94</sup> Once a standard violates any one of these basic GATT obligations, it can only be consistent with GATT if it qualifies as an Article XX exception.

The two Article XX exceptions most germane to environmental, health, and safety standards are Article XX(b), which allows for nondiscriminatory and nonarbitrary measures “necessary to protect human, animal or plant life or health”;<sup>95</sup> and, Article

92. GATT, *supra* note 1, art. III, 61 Stat. at A18; Housman & Zaelke, *supra* note 4, at 539; *Tuna-Dolphin Report*, *supra* note 91, at 50; GATT SECRETARIAT, *supra* note 32, at 11.

93. See GATT, *supra* note 1, art. I, 61 Stat. at A12; Housman & Zaelke, *supra* note 4, at 538-39; GATT SECRETARIAT, *supra* note 32, at 10.

94. GATT, *supra* note 1, art. XI, 61 Stat. at A33; Housman & Zaelke, *supra* note 4, at 542-43.

95. GATT, *supra* note 1, art. XX(1)(b), 61 Stat. at A61.

XX(g), which allows for nondiscriminatory and nonarbitrary measures "primarily aimed at" conserving exhaustible natural resources taken in conjunction with domestic restrictions on the consumption of such resources.<sup>96</sup> Despite the apparently broad scope of these exceptions, they have been applied quite narrowly in practice. Under current GATT jurisprudence, a party arguing that its standard falls within these exceptions must show that the standard adopted the least trade-restrictive alternative reasonably available to the party to meet its objective.<sup>97</sup> Whether the party's environmental experts have chosen the least trade-restrictive alternative reasonably available from the universe of possible standards is judged by a panel of trade experts *ex post facto*. Considering the complexity of the environmental problems, this overly restrictive standard makes environmental standards vulnerable to trade challenges and has a chilling effect on the adoption of more stringent standards which are needed to advance competitive sustainability.

## 2. Toward a Better Standard of Review

Countries moving toward sustainable development must be able to adopt environmental, health, and safety standards which provide incentives for environmentally sound actors, and place disincentives on unsound actors. Therefore, the current "least trade-restrictive reasonably available" standard of review should be changed to provide nations with wider leeway in adopting the standards needed to focus markets in the direction of competitive sustainability.<sup>98</sup>

A better standard of review would differentiate between standards which are discriminatory on their face and standards which are only discriminatory as they are applied. If a standard facially discriminates between products from different nations (either *vis-à-vis* domestic products or *vis-à-vis* other importers), such discrimination should be "necessary"<sup>99</sup> to the standard's objective.

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96. See Canada—*Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268 (Mar. 22, 1988). See also GATT, *supra* note 1, art. XX(1)(g), 61 Stat at A61; Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE, Oct. 1991, at 37, 38-47.

97. Housman & Zaelke, *supra* note 4, at 546-51.

98. See *id.* at 608-10.

99. See *supra* text accompanying note 95 (discussing "necessary test").

For example, the question would be posed as follows: Is it necessary to discriminate between U.S. beef and Japanese beef in order to protect the health of Japanese consumers?<sup>100</sup> To meet this test, the party challenging the standard would have to prove by a *prima facie* showing of the evidence that the discrimination in the standard does not serve the nonprotectionist objective of the standard.

When judging a standard that is discriminatory only as applied, the standard of review should give greater deference to the environmental standard. Environmental standards that are neutral on their face should be presumed to be GATT-consistent, unless the challenging party can prove that the standard is not "rationally" related to some legitimate environmental, health or safety goal.<sup>101</sup> Under this standard of review, a reviewing body would retain the right to find against environmental standards that are simply disguised protection. However, the burden of proving protectionism would be substantially higher than it is currently. The greater deference embodied by the rationality standard would provide countries with the leeway to adopt the standards necessary to bring about upward harmonization. It should also be noted that a two-tier deference approach similar to the one set out here is currently used within the United States to determine whether state standards improperly discriminate against out-of-state products.<sup>102</sup>

### 3. Multilateralism and Unilateralism

The trend in international trade policy thinking is toward greater leeway for using trade measures or standards in the context of international environmental agreements, while limiting the

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100. See Paul Blustein, *Scrapping Trade Barriers to U.S. Beef*, WASH. POST, Mar. 31, 1991, at H1; *Fight with Japan Has Been His Long-Running Beef*, CHI. TRIB., May 30, 1988, at C5.

101. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 276 (1981) (setting out "rationality" standard of review). With regard to placing the burden of proof on the challenging party, a similar allocation of the burden of proof has been used in the North American Free Trade Agreement. See NAFTA, *supra* note 48, arts. 765.6, 914.4.

102. Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) with *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978); see also Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1335-37 (1992).

use of unilateral trade measures for environmental purposes. Multilateral approaches to environmental problems are preferable, particularly with regard to global problems or problems affecting the global commons. However there is a danger in limiting the ability of countries to use unilateral measures because the measures provide impetus for the international community to act on a problem. For example, the United Nations driftnet moratoria followed unilateral threats by the United States that it would take trade measures to halt this environmentally devastating practice. Similarly, the threat of U.S. trade sanctions have played a major role in bringing about international efforts to save hawksbill turtles,<sup>103</sup> whales, and now, in the wake of the *Tuna-Dolphin* dispute, dolphin in the Eastern Tropical Pacific Ocean.<sup>104</sup> Without unilateral efforts, it is unlikely that the slothful international community would have responded to these threats in time.<sup>105</sup>

International trade rules should not compromise the ability of nations to use unilateral measures to spur international action on an environmental threat. A method must be devised for determining whether a unilateral trade measure is an appropriate response to a given threat. First, if the threat has a direct effect on the enacting country, then the standard of review should be whether the unilateral use of a trade measure was rationally related to addressing the environmental threat.

Second, if the trade measure seeks to address a threat to the global commons, the standard of review should also be rationality. In determining if a measure to protect the commons is rationally related to the alleged environmental goal, a number of factors should be considered, including: (1) Is there already an international regime designed to combat the threat?; (2) If a regime exists, how effective is it?; (3) Has the country adopting the measure sought to build an international protection regime to combat the threat?; (4) What degree of imminent harm does the threat present?; (5) How great is the harm; (6) How great is the burden

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103. Stewart, *supra* note 102, at 1359.

104. See Michael Parish, *U.S. Approves Pact to Protect Pacific's Dolphins*, L.A. TIMES, Oct. 9, 1992, at D2; *Tuna: Agreement Announced to Lift Mexico-Venezuela Ban*, Greenwire, June 18, 1992, available in LEXIS, Nexis library, GRNWRE file.

105. See David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 WILLAMETTE L. REV. 547, 552 (1992); PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 238 (1990).

to the restricted parties' trade rights?; (7) Are less trade inconsistent protection methods immediately apparent?; (8) How necessary is the complained of practice to the use of the resource?; and (9) Are less environmentally harmfully methods available?

Third, if the measure is taken to combat a threat that is completely localized within the territory of the exporting country, and has no effect on the importing country (a rarity in the environmental realm)<sup>106</sup>, then the appropriateness of the unilateral measure should be determined under the rationality standard taking into account a number of factors, including: (1) How great is the environmental threat addressed?; (2) How great is the trade burden?; (3) How focused is the measure adopted *vis-à-vis* the threat?; (4) Did the enacting country seek, through diplomatic measures, to have the importing country end the complained-of practice?; (5) Is there an international environmental standard in place, and how does it compare with the complained-of behavior?; (6) How effective is the international standard generally?; and (7) How effective would the international standard be as applied in this specific case? Whether a unilateral measure of this type is trade-compatible is moot if the measure qualifies as an environmental countervailing duty.<sup>107</sup>

#### 4. Who Judges?

Under the current system of trade dispute review at the international level, an environmental standard alleged to violate trade rules is reviewed by a panel of trade experts appointed under the aegis of GATT.<sup>108</sup> The natural effect of the appointment process is an implicit and unavoidable bias in favor of trade rules. Here again, review of environmental standards could be improved by a multi-tier process. If the standard in question is adopted by a country to implement a multilateral environmental agreement, then a panel of environmental experts formed under the aegis of the multilateral environmental agreement's secreta-

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106. See Sanford E. Gaines, *Taking Responsibility for Transboundary Environmental Effects*, 14 HASTINGS INT'L & COMP. L. REV. 781, 781 (1991). Sanford Gaines, currently with USTR, states eloquently that "[t]he ecological truth [is] that the nations of the world are bound together in an indivisible ecosystem for which we are jointly and severally responsible . . ." *Id.*

107. See *supra* note 58 and accompanying text.

108. See Housman & Zaelke, *supra* note 4, at 557-58.

riat<sup>109</sup> should pass judgment as to whether the implementation measure is a reasonable (in the case of facially neutral standards) or necessary (in the case of facially discriminatory standards) approach to implementing the agreement. The trade panel convened under the GATT would then defer to the environmental panel's conclusion and would apply it in passing on the trade law issues in the case.

If the standard in question is a unilateral environmental, health, or safety measure, review may properly take place under the aegis of a trade panel. However, the panel should be required to obtain environmental expertise in making its determination. Under this system, an environmental experts panel would be formed to take testimony and review evidence as to whether the measure is reasonably related or necessarily related to the desired environmental objective. The environmental magistrates would then issue a report on the appropriateness of the standard in question. The trade dispute panel in issuing its report would defer to any conclusions in the experts' report regarding the environmental aspects of the standard unless the conclusions in the report are patently erroneous.

##### 5. *Expanding the Players*

Under existing international trade agreements, if a dispute arises over an environmental standard, the review of the standard by a trade panel occurs on an intergovernmental level.<sup>110</sup> The public is completely excluded from this process. Individuals and nongovernmental organizations (NGOs), who have the real stake in ensuring that environmental standards are not compromised, are not allowed to present factual information directly to the reviewing panel. They must filter it through their governments and hope it is used. Moreover, the panel process and the parties' submissions to this process are considered confidential and cannot lawfully be released to the public.<sup>111</sup>

To bring about competitive sustainability, it is necessary to put environmental, health, and safety enforcement powers in the hands of parties who have the most to gain by an upward level-

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109. See generally JACKSON, *supra* note 31.

110. See Housman & Zaelke, *supra* note 4, at 557-58.

111. See *id.*

ling of the playing field, that is, private companies who are disadvantaged if their foreign competitors may operate under less stringent environmental laws. These private parties have the financial, technical, and legal resources necessary to bring about the upward harmonization desired.

Trade dispute resolution processes must be altered to provide real parties in interest (citizens, private companies, and other NGOs) with the ability to drive the process of upward harmonization. Under a best case scenario, trade dispute processes would be opened up to allow these parties to participate directly in initiating and conducting challenges. Given the existing antidemocratic nature of international law,<sup>112</sup> and the fear of abuse, it is unlikely that this scenario will develop quickly. An alternative approach that is less likely to threaten the status quo would be to provide citizens with broader participatory rights in their respective governments' trade decisionmaking processes and access to the information prepared and submitted in these disputes. Under this approach individuals and groups must also have the ability to monitor the conduct of disputes, and to submit, in the form of *amicus* briefs, relevant information into the process. They would not, however, participate directly in the international case.

A third approach to allow trade dispute resolution to continue at the intergovernmental level while providing the public participation necessary to advance competitive sustainability, would be to provide NGOs and citizens with access to alternative dispute resolution processes. Under this approach, private parties could bring an action against the foreign government for failing to execute its laws, or, in the alternative, against the subsidized foreign competitors, through an arbitration mechanism. If the arbitration panel finds an environmental trespass, the international agreement or domestic legislation could require the involved governments to begin the consultation and dispute process. The use of international arbitration by private parties through trade agreements has already received acceptance in NAFTA's provisions on intellectual property and antitrust.<sup>113</sup>

The benefits of public participation in enforcing environmen-

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112. See Hunter, *supra* note 105 at 552; ALLOTT, *supra* note 105 at 238.

113. See NAFTA, *supra* note 48, ch. 11, subch. B (Settlement of Disputes Between a Party and an Investor of Another Party).

tal laws could also be achieved outside of trade fora through international agreements. These agreements would extend the ability to sue to enforce these laws to aggrieved parties located in trading partner countries. Thus, in the context of United States-Mexico trade, a U.S. company or NGO who believes that lack of Mexican environmental enforcement is harmful could commence an action, applying Mexican substantive law, in a U.S. federal court. Then, the finding of the U.S. court could be enforced by a Mexican court under traditional principles of international law.<sup>114</sup> This equal access to justice approach has already been adopted by Denmark, Finland, Norway, and Sweden in the Nordic Environmental Protection Convention.<sup>115</sup> While nontrade tribunals hearing environmental enforcement cases might lack the remedy of trade measures, their ability to order the more direct remedy of actual enforcement of existing laws may make this option the most favorable option among nations with similar environmental standards.

#### E. Environmental Subsidies

Under the current system of trade rules, subsidies that produce a benefit for the company or industry receiving the benefit and an injury in another trading partner country, are subject to traditional trade disciplines such as countervailing duties.<sup>116</sup> The threat of a subsidy challenge has already had a chilling effect on a Canadian reforestation project and has raised concerns about the technology funding aspects of the Montreal Protocol. Consequently, trade rules must be rethought.<sup>117</sup>

First, if the subsidy is provided to a country's industries, or

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114. See Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 143-48 (1991). With regard to the principles surrounding enforcement in Mexico of a U.S. court's decision, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

115. *Convention on the Protection of the Environment*, Feb. 19, 1974, 1092 U.N.T.S. 279; see also Gallob, *supra* note 114, at 108-11.

116. See Magnier, *supra* note 2 (discussing "green-subsidies"). For example, trade rules may recognize a subsidy when the government pays a company to install a pollution control device. However, trade rules do not recognize that a subsidy has been made when a country does not impose laws requiring a factory to install the device. See Komoroski, *supra* note 43 and accompanying text.

117. See Magnier, *supra* note 2.

to a country to be passed on to its industries, under the auspices of a multilateral environmental accord, such as the Montreal Protocol, then that subsidy should not be actionable. If, however, the subsidy is not part of a multilateral environmental agreement, then it must be subjected to a more considered analysis. Environmental and trade reasons require that a country cannot generally be allowed to pay the environmental costs of its industries without its trading partners having recourse against it for the subsidy it is providing to these industries. However, in many developing countries some amount of subsidization is necessary to encourage cleaner growth. To the extent that a developing country subsidizes a private company to ensure that basic environmental protections are provided, that subsidy should not be countervailable. In judging whether a developing country's subsidies meet this test the "rationality" standard of review set out above should be used.<sup>118</sup>

Similarly, even in developed countries, some forms of environmental subsidy should not be open to wholesale challenge. For example, if a government subsidizes a company to exceed existing environmental standards, such as in a pilot program, and that subsidy is limited to the amount of excess cost imposed by the higher standard, and does not give the company a significant economic competitive advantage, that subsidy should not be actionable. Similarly, if the subsidy produces only minor or tangential short-term benefits to the "subsidized" company or industry, but produces a much larger long-term benefit to the citizenry, that subsidy also should not be actionable. For example, if Canadian companies are paid to reforest their lands with hardwood trees, which can take a substantial period of time to reach harvestable age, it is arguable that the companies' benefits are tangential to the greater societal benefits, particularly if the lands are open to public use. In determining whether such a program constitutes a subsidy the benefit to the company or industry should be prorated to include the benefit to the public. If using the prorated company or industry benefit still produces an injury in the trading country, only then would the subsidy be actionable.

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118. See *supra* note 101 and accompanying text.

  
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## III. CONCLUSION

The interplay of trade and environmental policies offers a unique set of challenges. Unless environmental issues are dealt with, the public may come to perceive the international trading system as a rogue actor out of touch with their concerns, and compromising the already shaky legitimacy of the system. For environmentalists, who often have an aversion to the economics of environmentalism and development, trade's cross-cutting complexities require an appreciation that is not always forthcoming. Given these difficulties, there is a certain false appeal to merely putting trade and environmental policies back on separate, and hopefully parallel, tracks. However, in order for both trade and environmental policies to be most efficient, these policy spheres must be made mutually reinforcing. Environmental policies must not unnecessarily distort trade flows; they must reward through the comparative advantage the most ecologically and economically efficient actors. By the same token, trade policies must direct market actors to engage in economic activities that are environmentally restorative and sustainable and must penalize those who act in an environmentally unsound and unsustainable manner. Competitive sustainability sets a course for steering trade and environmental policies toward a mutually reinforcing destination.









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